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IN THE

Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,
Petitioners,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

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QUESTION PRESENTED

Whether section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), preempts state and local clean air regulations that enhance the market for cleaner fleet vehicles, such as urban transit buses, without imposing any production mandates or other obligations on manufacturers.

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American Automobile Manufacturers Ass'n v. *Massachusetts Department of Environmental Protection*, 163 F.3d 74 (1st Cir. 1998) 24

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California Division of Labor Standards Enforcement v. *Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997) 18

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DeBuono v. *NYSA-ILA Medical Clinical Services Fund*, 520 U.S. 806 (1997) 25

Duncan v. *Walker*, 533 U.S. 167 (2001) 29

Engine Manufacturers Ass'n v. *EPA*, 88 F.3d 1075 (D.C. Cir. 1996) 43

English v. *General Electric Co.*, 496 U.S. 72 (1990) 41

FTC v. *Mandel Bros., Inc.*, 359 U.S. 385 (1959) 20

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Medtronic, Inc. v. *Lohr*, 518 U.S. 470 (1996) 13, 25, 27, 41

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Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 17, 18
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Motor Vehicle Manufacturers Ass'n of United States, Inc. v. *New York State Department of Environmental Conservation*, 79 F.3d 1298 (2d Cir. 1996) 22
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§§ 44299.75-44299.79 30
§§ 44299.80-44299.85 30
Colo. Rev. Stat. § 39-26-114(22) (2003) 30
Conn. Gen. Stat. § 12-412(67)-12-412(68) (2003) 30

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Ga. Code Ann. § 48-7-40.16 (2003) 30
415 Ill. Comp. Stat. 120/30 (2003) 30
Kan. Stat. Ann. § 79-32,201 (2002) 30
Md. Code Ann., Transp., § 13-815 (2003) 30
Me. Rev. Stat. Ann. tit. 36, § 1760(79) (2003) 30
N.Y. Tax Law § 606(p) (2003) 30
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R.I. Gen. Laws § 44-18-30(53) (2002) 30
Utah Code Ann. § 59-10-127 (2003) 30
Va. Code Ann. § 58.1-438.1 (2003) 30
W. Va. Code § 11-6D-5 (2003) 30

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58 Fed. Reg. 11888 (Mar. 1, 1993) 37
58 Fed. Reg. 32474 (June 10, 1993) 41
59 Fed. Reg. 48664 (Sept. 22, 1994) 9
63 Fed. Reg. 20103 (Apr. 23, 1998) 4, 8, 14, 38
65 Fed. Reg. 6091 (Feb. 8, 2000) 28
68 Fed. Reg. 19316 (Apr. 18, 2003) 28
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LEGISLATIVE MATERIAL

A Legislative History of the Clean Air Act Amendments of 1990, Senate Comm. on Public Works, 103d Cong., 1st Sess., Serial No. 103-38 (1993) 8, 33, 38, 42
H.R. Rep. No. 89-899 (1965) 20, 21
H.R. Rep. No. 90-728 (1967) 23, 33
H.R. Rep. No. 95-294 (1977) 22, 33, 42
H.R. Rep. No. 101-490 (1990) 40
S. Rep. No. 89-192 (1965) 33
S. Rep. No. 90-403 (1967) 5, 6, 7, 22, 23, 26, 33
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Currie, David P., *Motor Vehicle Air Pollution: State Authority and Federal Preemption*, 68 Mich. L. Rev. 1083 (1970) 9, 21

Letter from Gary S. Guzy (EPA) to the Honorable Thomas F. Reilly, Sept. 15, 1999 ..... 13, 23, 25

U.S. Department of Health, Education, and Welfare, *A Digest of State Air Pollution Laws* (1963 ed.) 17

U.S. Department of Health, Education, and Welfare, *A Digest of State Air Pollution Laws* (1967 ed.) 21, 22

Webster's Third New International Dictionary (1993) 19

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BRIEF FOR RESPONDENT SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

INTRODUCTION

In 1999 a new study established that diesel exhaust accounted for 70% of the carcinogenic toxins in the air breathed by the inhabitants of the Los Angeles Basin—which, to this day, remains the only ozone "extreme nonattainment" area in the country. *See* JA 81-84, 258-274. This case presents two different views of how our federalist system should respond to such crises. Petitioners argue that the Clean Air Act creates a centralized command-and-control regime under which the federal government, rather than the affected states or localities, must play the lead role in alleviating region-specific pollution problems—even with respect to measures that enhance the regional market for cleaner motor vehicles. The courts below, in contrast, held

that states and localities retain their inherent authority to create targeted solutions to regional problems so long as they do not require *manufacturers* to produce vehicles with particular emissions characteristics. Resolution of this dispute will have immense significance both within and outside of California because, as this Court has observed, "measures which might be adequate to deal with pollution in a city such as San Francisco, might be grossly inadequate in a city such as Phoenix, where geographical and meteorological conditions trap aerosols and particulates." *Washington* v. *General Motors Corp.*, 406 U.S. 109, 116 (1972).

Congress did not intend to hamstring states and localities in their efforts to respond flexibly and promptly to local air-quality problems—and, in particular, it did not foreclose the fleet purchasing regulations at issue in this case. The Clean Air Act establishes a federal-state partnership to combat the "mounting dangers to the public health and welfare" posed by air pollution. 42 U.S.C. § 7401(a)(2). For the most part, Congress preserved the states' inherent authority to combat air pollution within their borders, an authority that "falls within ... even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 442 (1960); *see also* 42 U.S.C. § 7416. The preemption provision at issue here—section 209(a) of the Act—is an important but narrow exception to this retained power, designed to protect manufacturers from the burden of having to comply with 50 different state "standard[s] relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a).

As discussed below, the "standards" that section 209(a) preempts are the same type of *production mandates* that the federal government itself imposes on manufacturers under section 202 of the Act, also under the name "standards": *i.e.*, requirements that the vehicles that manufacturers produce meet particular emissions criteria, individually or on average. *See* 42 U.S.C. § 7521. Section 209(a) does not preempt the fleet purchasing rules at issue here, because those rules impose no production mandates (or any other obligation, for that matter) on manufacturers; instead, they require the operators of certain vehicle fleets within the Los Angeles Basin to choose among the cleaner types of California-approved motor vehicles if, *and only if*, they are commercially available. This conclusion is faithful to the statutory text and structure, and it is fully consistent with the long-standing views of the Environmental Protection Agency ("EPA"), whose absence from the Justice Department's amicus brief is perhaps as telling as it is irregular.

The gist of petitioners' contrary argument is that, with a single exception inapplicable here, section 209(a) categorically preempts any state or local environmental regulation that contains an "express reference to," or is "linked in some other manner to[,] control of motor vehicle emissions." Pet. Br. 28. That position would unhinge the scope of preemption under section 209(a) from the scope of federal "standard"-setting under section 202. Indeed, carried to its logical conclusion, petitioners' position would require the elimination of myriad state and local programs whose validity has never been seriously questioned, such as the many incentive programs that condition tax benefits on the purchase of cleaner vehicles. As the Justice Department concedes (U.S. Br. 17 n.4), section 209(a) does "not generally reach state voluntary or incentive programs that merely encourage vehicle manufacturers to sell, or consumers to buy, vehicles with particular emission characteristics." Yet these programs would fall prey to petitioners' view of section 209(a) because they make "express reference to" emission characteristics (Pet. Br. 28)—indeed, they condition valuable consumer benefits on them.

Drawing the line instead between prohibited production mandates for manufacturers, on the one hand, and permissible purchasing restrictions and incentive programs for consumers, on the other, establishes a sensible rule of decision that courts can easily administer. And it appropriately balances the interests of manufacturers against those of states and localities—both inside and outside of California—that wish to limit their number of pollution-choked "Code Red"

days. Petitioners express concern (Br. 26) that purchase restrictions, if widely adopted, would become indistinguishable from production mandates. But Congress itself has refuted that logic in a closely related provision of the Clean Air Act. As EPA has explained, Congress's desire to spur the introduction of clean-fuel vehicles presented "a clear choice between two alternatives: [1] requiring auto manufacturers *to produce* and sell [clean-fuel vehicles], or [2] creating a market for [clean-fuel vehicles] . . . by requiring fleet operators *to purchase* such vehicles[.]" 63 Fed. Reg. 20103, 20105 (Apr. 23, 1998) (emphasis added) (App. 49a).[1] In designing the federal fleet purchasing program in section 246, 42 U.S.C. § 7586, Congress attributed decisive significance to that distinction and, to protect the interests of manufacturers, chose the latter option. The same distinction is equally workable, and equally consistent with congressional intent, as a means of delimiting the scope of section 209(a).

STATEMENT

A. The Clean Air Act

The Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7401-7671q, creates a cooperative federal-state framework "in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). Congress instructed EPA to establish national ambient air quality standards for pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." CAA § 108, 42 U.S.C. § 7408(a)(1)(A). And Congress directed state and local governments to formulate ways to attain these federal air quality standards. *See* CAA § 110, 42 U.S.C. § 7410.

Because pollutants originate from a variety of mobile and stationary sources, CAA § 108, 42 U.S.C. § 7408(a)(1)(B), the Act requires each state to create a "state implementation plan," or "SIP," for the regulation of all such sources. CAA § 110, 42 U.S.C. § 7410; *see also Train* v. *Natural Res. Def. Council, Inc.*, 421 U.S. 60, 68 (1975) (describing SIP regime as "a comprehensive planning task of the first magnitude"). Motor vehicle exhaust contributes heavily to air pollution in many parts of the country, releasing into the atmosphere such toxins as carbon monoxide, nitrogen oxide, and ozone. *See* S. Rep. No. 101-228, at 82-86 (1989) (noting that "mobile vehicles are the largest source of ozone and carbon monoxide pollution"). Congress has required states with "nonattainment areas"—*i.e.*, areas whose air quality fails national air quality standards—to adopt specific mobile source pollution programs. *See, e.g.*, CAA § 182, 42 U.S.C. § 7511a(b)(4), (c)(5).

More broadly, Congress has recognized that air pollution control "is the primary responsibility of States and local governments" and has confirmed its intent "to encourage and assist the development and operation of regional air pollution prevention and control programs." CAA § 101, 42 U.S.C. §§ 7401(a)(3), (b)(4). To that end, in section 116 of the Act, Congress has affirmed the states' traditional authority to "adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416. This case concerns the scope of a statutory exception to that general rule with respect to "standards" for the control of motor vehicle emissions.

In 1957 California became the first state to undertake "[c]omprehensive statewide efforts" to control motor vehicle emissions. *Motor & Equip. Mfrs. Ass'n* v. *EPA*, 627 F.2d 1095, 1109 n.26 (D.C. Cir. 1979). Those efforts ultimately included "production mandates" for manufacturers: *i.e.*, obligations that the vehicles they built and sold had devices that could attain particular emissions characteristics. *See* S. Rep. No. 90-403, at 33 (1967) (discussing "California's experience with lower standards which will require new control systems and design"). In 1965, Congress followed California's example by enacting section 202 of the Clean Air

[1] This and other relevant materials, including the referenced provisions of the Clean Air Act, are attached as an Appendix to this brief.

Act, authorizing for the first time the creation of federal "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines." 42 U.S.C. § 7521(a)(1). Like California's production mandates, the federal "standards" of section 202 are also directed at motor vehicle manufacturers, requiring that the vehicles they produce meet certain numerical or technology-based emission levels. *See, e.g.*, 42 U.S.C. § 7521(a)(3)(B)(2) (regulations for certain model years "shall contain standards that [oxides of nitrogen] emissions may not exceed 4.0 grams per brake horsepower hour").

Following enactment of section 202, California and other states either continued to enforce or proposed to implement their own motor vehicle emission standards. *See infra* p. 21 & note 7. The automobile industry expressed concern about the costs of complying with the divergent production mandates of the federal government and, potentially, dozens of states. *See, e.g.*, Senate Rep. No. 90-403, at 33 ("The auto industry . . . was adamant that the nature of their manufacturing mechanism required a single national standard in order to eliminate undue economic strain on the industry."). Congress responded in 1967 with the enactment of the preemption provision at issue in this case: section 209(a). *See* 42 U.S.C. § 7543(a).

Section 209(a) federalizes the field of emissions-related production mandates, thereby marking an important, but limited, exception to the states' retained authority to regulate the sources of air pollution. Specifically, section 209(a) bars states and localities from adopting or attempting to enforce "any standard relating to the control of emissions from new motor vehicles." *Id.* The debate over section 209(a) sharpened the differences "between the states, which wanted to preserve their traditional role in regulating motor vehicles, and the manufacturers, which wanted to avoid the economic disruption latent in having to meet fifty-one separate sets of emissions control requirements." *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1109. By preventing states from enacting their own versions of the "standards" imposed

by the federal government in section 202, but not from implementing emissions policies more generally, Congress shielded the motor vehicle industry from conflicting production mandates while leaving states with sufficient flexibility to respond to local motor vehicle pollution problems. *See Allway Taxi, Inc.* v. *City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y.) ("[B]oth the history and text of the Act show that the . . . preemption section was made not to hamstring localities in their fight against air pollution but to prevent the burden on interstate commerce which would result if, instead of uniform standards, every state and locality were left free to impose different standards for exhaust emission control . . . for the manufacture and sale of new cars."), *aff'd*, 468 F.2d 624 (2d Cir. 1972).

Congress qualified the application of section 209(a) to California in one key respect. In recognition of that state's "unique problems and pioneering efforts" in the field of air-pollution regulation (S. Rep. No. 90-403, at 33), section 209(b) authorizes California to apply to EPA for a waiver of preemption so that it can establish "standards" of its own that depart from the federal government's standards. 42 U.S.C. § 7543(b). Section 209(b) provides that California's "standards" must be "consistent with section [202]" and as "protective of public health and welfare as applicable Federal standards." *Id.* § 7543(b)(1). The upshot is that only the federal government and, to the extent permitted by EPA, California may adopt and enforce "standards" for the control of emissions from new motor vehicles or engines. The motor vehicle industry is thus required to comply only with those two standards in designing and producing motor vehicles. *See* CAA §§ 202, 209, 42 U.S.C. §§ 7521(a), 7543(b).

In 1977 Congress further amended the Clean Air Act to add section 177, which permits any state to adopt EPA-approved California "standards" as its own. *See* 42 U.S.C. § 7507. To protect the motor vehicle industry from the specter of new production mandates, however, section 177 provides that the "standards" of opt-in states must be "identical" to those of California. *Id.* "States exercising this sec-

tion 177 option may not, in such adoption and enforcement, create a 'third vehicle[ ]' that is not a California vehicle or a 49-state Federal vehicle[ ], because of the burden it would place on the motor vehicle manufacturers." *A Legislative History of the Clean Air Act Amendments of 1990*, Senate Comm. on Public Works, 103d Cong., 1st Sess., Serial No. 103-38, at 1787 (1993) ("*1990 Legislative History*").

Finally, in 1990 Congress added a requirement that states with particular "nonattainment" areas meet their federal clean air obligations either (i) by adopting a federal program, set forth in section 246, for reducing the emissions of fleet vehicles, *see* 42 U.S.C. § 7586, or (ii) by formulating an alternative program that achieves the same ozone and carbon monoxide reductions, *see* CAA § 182, 42 U.S.C. § 7511a(c)(4)(B). The default federal program imposed in section 246 requires covered fleet operators (those with 10 or more vehicles) to purchase a specified percentage of clean-fuel vehicles and to run them with clean alternative fuels. *See id.* § 7586(b). EPA has explained that "Congress made a clear choice" in section 246 to "creat[e] a market for [clean-fuel vehicles]...by requiring fleet operators *to purchase* such vehicles" rather than to "requir[e] auto manufacturers *to produce* and sell" such vehicles. 63 Fed. Reg. at 20105 (emphasis added) (App. 49a). Senator Carl Levin of Michigan likewise noted that the fleet purchasing requirements of section 246 were "carefully designed to avoid ... mandated production and sales," even though they certainly do "create a substantial demand for [clean vehicles], giving motor vehicle manufacturers a real incentive to bring them into production." *1990 Legislative History*, at 7209.

B. The Fleet Rules

The California Air Resources Board, known as "CARB," is the state agency that exercises California's authority under section 209(b) to seek waivers for California-specific emission "standards." *See* Cal. Health & Safety Code §§ 39003, 39601, 39602. For light- and medium-duty vehicles, CARB has adopted—with EPA's approval—several "tiers" of motor vehicle emission standards: transitional low-

emission vehicles ("TLEV"), low-emission vehicles ("LEV"), ultra-low-emission vehicles ("ULEV"), super-ultra-low-emission vehicles ("SULEV"), and zero-emission vehicles ("ZEV"). Each tier is assigned a set of numerical emission levels for specific motor vehicle pollutants. *See* Cal. Code of Regs., tit. 13, §§ 1960.1, 1961. Manufacturers may produce vehicles in any of the tiers so long as they meet an overall average emissions level. *See id.* For heavy-duty vehicles, CARB has promulgated both general emission standards, *see id.* § 1956.8, and more stringent standards for urban transit buses, *see id.* §§ 1956.1, 1956.2. These CARB programs include "phase-in" requirements designed to create a steady increase in the production of cleaner vehicles. *See id.* §§ 1960.1, 1961, 1956.8.

Respondent South Coast Air Quality Management District ("District"), a political subdivision of California, is "the sole and exclusive local agency within the South Coast Air Basin with the responsibility for comprehensive air pollution control." Cal. Health & Safety Code § 40412; *see generally id.* §§ 40400-40540. The largest agency of its kind, the District is responsible for the air quality of the nearly 15 million people who live in the greater Los Angeles metropolitan area, including major portions of the counties of Los Angeles, Orange, Riverside, and San Bernardino. *See id.* §§ 40410, 40412. The District is governed by a board of 12 members, nine of whom are elected city and county officials. *See id.* §§ 40420-40423.

Southern California has, to say the least, unique and severe air pollution problems. Indeed, the Los Angeles Basin is the only area of the United States designated in "extreme nonattainment" of the national air quality ozone standards. CAA § 181, 42 U.S.C. § 7511(a); 40 C.F.R. § 81.305. For the most part, this is because of motor vehicle exhaust: "[a]utomobiles have single-handedly ruined the atmosphere of Los Angeles." David P. Currie, *Motor Vehicle Air Pollution: State Authority and Federal Preemption*, 68 Mich. L. Rev. 1083, 1084 (1970). Of necessity, the District has become a leader in creating and implementing new air pollution con-

trol programs. *See* 59 Fed. Reg. 48664, 48681-48682 (Sept. 22, 1994).

In 1987 the California legislature gave the District, among its other powers, authority to adopt "fleet rules" governing the purchase of public and commercial fleets of 15 or more vehicles, such as urban transit buses, garbage trucks, and airport shuttles operating within the South Coast District. Cal. Health & Safety Code § 40447.5. The District adopted the Fleet Rules at issue in this case 13 years later, shortly after CARB listed "particulate emissions from diesel-fueled engines" as "toxic air contaminant[s]," Cal. Code Regs. tit. 17, § 93000, and after publication of startling new data showing that fully 70% of the airborne cancer risk to residents of the Los Angeles Basin could be traced to diesel exhaust, JA 81-84, 258-274.

The Fleet Rules (JA 16-74) require certain fleet operators to obtain low-emission or alternative-fuel vehicles—rather than diesel-fuel vehicles—that have been approved by CARB. The vehicles meeting those requirements are thus a subset of the vehicles currently available and certified for use in California. *Id.* at 219. The Fleet Rules govern public entities with fleets of light- and medium-duty passenger vehicles (Rule 1191); public entities with fleets of public transit vehicles or urban buses (Rule 1192); public and private entities with fleets of solid waste collection vehicles (Rule 1193); public and private entities with fleets of passenger airport transportation vehicles, including shuttle and taxicab pickup services (Rule 1194); public and private entities with fleets of street sweepers (Rule 1186.1); and public entities with fleets of heavy-duty vehicles (Rule 1196). To ease compliance, several of the Fleet Rules did not go into effect until almost a year after their enactment. *Id.* at 19, 54, 68. The vast majority, but not all, of the affected fleets are owned and operated by California public agencies. *Id.* at 24, 46, 66.

The Fleet Rules exempt fleet operators from purchasing the designated types of low-emission or alternative-fuel vehicles when they can show that such vehicles are not

commercially available, in which event the operators are free to buy any other CARB-certified vehicle. JA 21-22, 30, 50, 55, 63, 69-71. Even where designated vehicles are available, fleet operators may, in some circumstances, receive an exemption if they show that those vehicles are not cost-effective or useful. *E.g.*, *id.* at 69-70. Significantly, the Fleet Rules impose no production mandates or any other requirements on manufacturers. The only such mandates are those imposed by the federal government and, with EPA's approval, CARB.

C. Proceedings Below

In August 2000 petitioner Engine Manufacturers Association sued the District, alleging that the Fleet Rules are preempted by sections 209 and 177 of the Clean Air Act. JA 5. Petitioner Western States Petroleum Association intervened as a plaintiff, and respondents Coalition for Clean Air, Inc., Natural Resources Defense Council, Inc., Communities for a Better Environment, Inc., Planning and Conservation League, and Sierra Club intervened as defendants. *Id.* at 5, 6.

On cross-motions for summary judgment, the district court granted summary judgment to respondents and upheld the Fleet Rules. Pet. App. 3a-27a. Based upon the undisputed evidence, it found that the Los Angeles Basin has "the most serious air quality problems in the nation," that "[o]n-road motor vehicles . . . are a principal source of toxic pollution," and that "[t]he presence of high quantities of fine particles in the air has been shown to lead to higher mortality rates, greater occurrences and severity of asthma, cardiovascular disease, and potentially to a higher incidence of cancer." *Id.* at 5a-6a. The Clean Air Act, the court continued, "makes clear that the states retain the leading authority in regulating matters of health and air quality." *Id.* at 8a. The court also determined that, under this Court's precedents, section 209(a) "must be narrowly and strictly construed" because it addresses the states' historic police powers. *Id.*

The district court held that the Fleet Rules "do not set 'a standard relating to the control of emissions,'" as proscribed by section 209(a), because they "impose no new emission requirements on manufacturers whatsoever, and therefore do not run afoul of Congress's purpose behind motor vehicle preemption: namely, the protection of manufacturers against having to build engines in compliance with a multiplicity of standards." Pet. App. 21a. The court contrasted the Fleet Rules to the ZEV sales-quota programs of New York and Massachusetts, which were considered "standards" because they "mandated that a [certain] specified percentage of cars sold by manufacturers in any model year be ZEVs." *Id.* at 22a-23a (discussing *Association of Int'l Auto. Mfrs., Inc.* v. *Commissioner, Mass. Dep't of Envtl. Prot.*, 208 F.3d 1, 7 (1st Cir. 2000), and *American Auto. Mfrs. Ass'n* v. *Cahill*, 152 F.3d 196, 200 (2d Cir. 1998)). "Rather than imposing any numerical control on new vehicles," the court reasoned, the Fleet Rules "regulate the purchase of previously-certified vehicles" and leave manufacturers free "to sell any vehicle which is otherwise certified in California." *Id.* at 21a, 23a.

The court of appeals affirmed on the basis of the district court's opinion. *Id.* at 1a-2a.

SUMMARY OF ARGUMENT

Section 209(a) provides: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines[.]" Despite petitioners' labored exegesis of various words in that sentence, it is common ground that section 209(a) cannot preempt the Fleet Rules unless, among other things, those Rules constitute "standards." As the Justice Department notes (U.S. Br. 15), that term has "varied usage[s] . . . throughout the Clean Air Act," and its meaning within section 209(a) must be discerned "primarily by context" and the statutory structure.

Here, the only way to make sense of the statutory scheme is to construe the "standards" preempted under section 209(a) as coextensive with the types of "standards" that the federal government itself imposes under section 202 of the Clean Air Act: *i.e.*, production mandates that require manufacturers to ensure that the vehicles they produce have particular emissions characteristics, whether individually or in the aggregate. EPA itself put it best in 1999 when, in response to a primary jurisdiction referral, it declared that a "standard" for purposes of section 209(a) is a "requirement to produce a certain number or percentage of vehicles ('production requirement') to meet a numerical emissions limitation"; that this "requirement to produce vehicles is in fact part of the emission standard"; and that "[t]his combination of an emissions limit and a requirement to produce vehicles meeting that limit is key to evaluating certain central issues in standard setting." Letter from Gary S. Guzy (EPA) to the Honorable Thomas F. Reilly, Sept. 15, 1999, at 8-9 (App. 70a-72a).

Section 209(a) thus preempts state-level production mandates, but not regulations and policies that—like state incentive plans or these fleet purchase requirements—merely enlarge the market for cleaner vehicles by creating greater demand for them. Petitioners' much broader view of the "standards" preempted by section 209(a) would unmoor that term from its meaning in section 202 and would give rise to needless interpretive anomalies in the relationships between section 209(a) and 209(b) and between the first and second sentences of section 209(a) itself. Petitioners' reading also flies in the face of the traditional "presumption against the pre-emption of state police power regulations," which requires "a narrow interpretation" even of express preemption provisions. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks and citation omitted).

Quite apart from these textual considerations, petitioners' theory of section 209(a) is untenable because it is irremediably overbroad. As the Justice Department concedes (U.S. Br. 17 n.4), section 209(a) cannot plausibly be read to preempt the many existing state and local programs that

give purchasers substantial incentives to buy cleaner vehicles and that therefore, in practice, encourage manufacturers to produce more of them. For preemption purposes, there is no valid distinction between those presumptively valid incentive programs and the fleet purchasing restrictions at issue here. Although the Fleet Rules (unlike incentive programs) impose direct requirements on purchasers, the relevant question under the Clean Air Act is whether the program at issue imposes compulsory duties on *manufacturers*. Like incentive programs, the Fleet Rules impose no such obligation. To be sure, also like incentive programs, the Fleet Rules may "encourage vehicle manufacturers to sell ... vehicles with particular emission characteristics" (U.S. Br. 17 n.4) to accommodate increased demand. But that is not the test, as the Justice Department acknowledges (*id.*); if it were, incentive programs would all be preempted. And, from a manufacturer's perspective, there is no reason in principle why a locality's fleet purchasing requirements should be any more or less likely to have that demand-side effect than a successful incentive program—particularly where, as here, the fleet purchasers can invoke an exemption whenever the specified vehicles are commercially unavailable.

In sum, section 209(a) draws the line between, on the one hand, preempted production mandates that compel manufacturers to conform the vehicles they produce to certain emission or fuel requirements and, on the other hand, non-preempted programs that merely encourage manufacturers to produce such vehicles by enlarging the market for them. Although petitioners criticize this line as "nonsensical" (Br. 25), it is anything but; indeed, it is the very line Congress separately drew in designing the federal fleet program under section 246 of the Act. As EPA has explained, Congress's desire to promote the introduction of clean-fuel vehicles presented "a clear choice between two alternatives: requiring auto manufacturers *to produce* and sell [clean-fuel vehicles], or creating a market for [those vehicles] ... by requiring fleet operators *to purchase* such vehicles[.]" 63 Fed. Reg. at 20105 (emphasis added) (App. 49a). Congress chose

the latter approach, rather than the former, to balance the interests of manufacturers against its environmental objectives. Section 209(a) is properly read to serve the same goal by drawing the same line—*i.e.*, between permissible demand-side regulation of purchasing decisions and impermissible production mandates imposed directly on manufacturers. Any concern about the long-run merits of that line should be addressed to the political branches, not to the courts.

Petitioners suggest—for the first time in this Court—that the federal fleet program *itself* somehow preempts state and local alternatives to that program. Any such argument is waived and, in all events, is implausible on the merits. Section 246 *requires* states with non-attainment areas to adopt either the federal fleet program or some EPA-approved alternative; it does not purport to *authorize* states to adopt otherwise preempted programs, because no such authorization is needed. And petitioners' grab bag of other statutory provisions is similarly unhelpful to their position. Section 177 does not apply to the District; it would not preempt these Fleet Rules even if they had been adopted by some state or locality outside of California; and it would not be anomalous in any event to shield California and its political subdivisions from the preemptive effect of that provision, given California's special status as the locus of unique pollution problems and as the pioneer of clean air initiatives. Finally, the savings clause of section 209(d) confirms that states may "restrict the use" of motor vehicles in various respects and, as such, does not remotely speak to the scope of section 209(a)'s preemption of "standards."

There is also no merit to the suggestion that section 209(a) should be construed expansively because California may seek EPA approval of otherwise preempted clean air regulations under section 209(b). The expansive interpretation of section 209(a) that petitioners advocate would have nationwide application, and 49 of the 50 states aggrieved by that interpretation would find no solace in the California-specific provisions of section 209(b). In all events, the

threshold question is whether a state program imposes a "standard." If it does not, it would be both unnecessary and inimical to principles of state sovereignty to force states to seek prior approval from federal regulators before implementing environmental programs designed to suit local needs and achieve federally-mandated overall air-quality targets. Nothing in section 209(a) strips the states of their core sovereign authority to address such local concerns through environmental initiatives other than production mandates.

ARGUMENT

THE FLEET RULES ARE PERMISSIBLE BECAUSE THEY ENHANCE THE MARKET FOR CLEAN-FUEL VEHICLES WITHOUT IMPOSING PRODUCTION MANDATES ON MANUFACTURERS.

I. THE "STANDARDS" PREEMPTED UNDER SECTION 209(a) ARE THE SAME TYPE OF "STANDARDS"—PRODUCTION MANDATES—THAT THE FEDERAL GOVERNMENT IMPOSES ON MANUFACTURERS UNDER SECTION 202.

The scope of section 209(a)'s prohibition on state or local "standards" is coextensive with the type of production mandates that the federal government itself imposes on manufacturers under section 202 of the Clean Air Act, also under the name "standards." As discussed below, that construction: (1) is consistent with the most applicable dictionary definition of the term; (2) is the only way to make sense of the statutory structure as a whole; (3) follows EPA's own consistent understanding of the term for purposes of both sections 202 and 209(b); (4) avoids the interpretive anomalies that petitioners' alternative construction would produce; and (5) remains faithful to this Court's rule favoring a narrow construction of express preemption clauses in cases of ambiguity.

1. "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise

of even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 442 (1960). Historically, the states played the predominant role in mitigating air pollution from all sources, including motor vehicle exhaust. California, for example, preceded the federal government by a number of years in subjecting manufacturers to standards for reducing motor vehicle emissions. *See Motor & Equip. Mfrs. Ass'n* v. *EPA*, 627 F.2d 1095, 1108-09 & nn.25, 26 (D.C. Cir. 1979).[2] The Clean Air Act builds upon the states' traditional police powers and makes them and the federal government "partners in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). To that end, the Act generally preserves the states' authority to "adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." CAA § 116, 42 U.S.C. § 7416.

Section 209(a) is a limited exception to this retained authority, preempting any "standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). The principal question in this case is the meaning of the word "standard" as it appears in this provision. Stated simply, if a state or local rule does not qualify as a "standard," it falls outside the preemptive scope of section 209(a). Petitioners devote many pages to a sweeping interpretation of the term "relating to" in the clause following the word "standard"—an interpretation that contradicts this Court's consistent recognition, in cases after *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), of the inevitable

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[2] By 1963—two years before the federal government first enacted motor vehicle emission control standards—40 states had begun to address air pollution, with seven of those states plus the District of Columbia specifically targeting motor vehicle emissions. *See* U.S. Dep't of Heath, Education and Welfare, *A Digest of State Air Pollution Laws* (1963 ed.), at 11-19 (California), 39 (Colorado), 46 (District of Colombia), 92 (Indiana), 94 (Kansas), 115 (Michigan), 124 (New Hampshire), 139 (New York).

need for a narrow construction of "relating to" clauses.[3] But this Court need not revisit the meaning of such clauses here, because petitioners' argument fails on more fundamental grounds. Congress preempted only "standard[s] relating to the control of emissions." It did not more expansively preempt any "law, rule, regulation, standard, or other provision having the force and effect of law relating to" the applicable subject matter—the preemption language at issue in *Morales*. *See id.* at 383 (internal quotation marks and citation omitted).

The text of section 209 underscores the importance of that distinction. Section 209(e), applicable only to certain "nonroad vehicles," preempts any state or local "standard *or other requirement* relating to the control of emissions" of those vehicles. 42 U.S.C. § 7543(e) (emphasis added). The omission of similar language in the parallel provision of section 209(a) establishes, at a minimum, that at least some state or local requirements "relating to the control of emissions" of the on-road vehicles at issue here are *not* "standards." Here, as in other settings, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *General Motors Corp.* v. *United States*, 496 U.S. 530, 538 (1990) (internal quotation marks and citations omitted).

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[3] *See, e.g., New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("If 'relate to' were taken to extend to the further stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere.") (internal quotation marks and citation omitted); *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997) (" 'an uncritical literalism' " in applying the "relates to" language "offer[s] scant utility in determining Congress' intent") (quoting *Travelers*, 514 U.S. at 656); *id.* at 335 (Scalia, J., concurring) ("applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else").

Properly construed, the class of "standards" preempted under section 209(a) excludes the fleet purchase requirements at issue here. Claiming that "this case begins and ends with the text of Section 209(a)," petitioners selectively offer up the broadest dictionary definition of the word "standard." Pet. Br. 22, 24. But that term means dissimilar things in different settings, as a glance at any dictionary reveals. Indeed, the term has "varied usage[s] . . . throughout the Clean Air Act" itself, as the Justice Department notes, and the task of construing its meaning within section 209(a) is informed "primarily by context." U.S. Br. 15. The definition that most closely fits this context, and that comes nearest to specifying the field that Congress wished to federalize, is "carefully drawn specifications covering manufacturing material or equipment." *Webster's Third New Int'l Dictionary* 2223 (1993). In the automotive industry, an "emissions standard" is a "manufacturing specification" for motor vehicle emissions, *see, e.g., infra* pp. 20-21, and section 209(a) prevents states from adopting or enforcing such a "standard"—*i.e.*, subjecting manufacturers to a mandate that the vehicles they produce meet specified emissions levels, either individually or in the aggregate.

That is indeed the only way to make sense of the overall statutory structure. Because "[a]mbiguity is a creature not of definitional possibilities but of statutory context," *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989); *see also Whitman* v. *American Trucking Ass'n*, 531 U.S. 457, 466 (2001) ("Words that can have more than one meaning are given content . . . by their surroundings[.]"). Here, section 209(a) is a companion provision to section 202 of the Clean Air Act, which establishes emissions "standards" for the motor vehicle industry by requiring that the vehicles or engines that manufacturers produce meet defined emissions criteria. *See* 42 U.S.C. § 7521. The only way to achieve symmetry and coherence between these two provisions, and fit them within a

"harmonious whole," *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959), is to construe the scope of the "standards" *preempted* by section 209(a) as coextensive with the type of "standards"—production mandates—*imposed* under section 202. Remarkably, however, both petitioners and the Justice Department—which acknowledges that "standard" has varied meanings under the Act (U.S. Br. 15)—largely ignore the most applicable use of the term, in section 202.

A brief review of that provision will help clarify the nature of these "standards." Congress enacted Title II of the Clean Air Act in 1965 to address the serious threat to the public health posed by emissions from motor vehicles. *See* H.R. Rep. No. 89-899, at 3 (1965) (Title II addresses "air pollution, especially emanating from motor vehicles, affecting thousands of communities in all parts of the country and imposing a serious threat to public health and national welfare"). Central to that effort was section 202, which authorized—for the first time—the enactment of federal "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines." 42 U.S.C. § 7521(a)(1). These federal "standards" are directed at motor vehicle manufacturers, and require them to produce vehicles that meet certain numerical or technology-based emission levels.

In particular, section 202 consistently defines "standards" in terms of the quantity of pollutants that may be emitted from new motor vehicle tailpipes. To take just one example, regulations for heavy-duty trucks "shall contain standards which provide that [oxides of nitrogen] emissions may not exceed 4.0 grams per brake horsepower hour." 42 U.S.C. § 7521(a)(3)(B)(ii).[4] Such "standards" often apply by

[4] *See also id.* § 7521(a)(3)(A)(i) (providing that standards for certain pollutants shall "reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available"); *id.* § 7521(b)(1)(C) (discussing "numerical emission standards specified in subsections (a)(3)(B)(ii), (g), (h), and (i)"); *id.* § 7521(g)(1) (mandating "standards which provide that emissions from a percentage of each manufacturer's sales volume of [light-duty] vehicles and trucks shall comply with the levels specified in table G [expressed in grams per mile]"); *id.* § 7521(j)(1) (prescribing "standards which provide that emissions of carbon monoxide from a manufacturer's vehicles when operated at 20 degrees Fahrenheit may not exceed" specified "grams per mile").

The first regulations enacted under section 202 expressed "standards for exhaust emissions" in numerical terms. 31 Fed. Reg. 5170 (Mar. 30, 1966) (defining "standards for exhaust emissions" as "400 parts per million" for hydrocarbons and "2.3 percent by volume" for carbon monoxide).

"model year," which is defined as "the manufacturer's annual production period." *Id.* § 7521(b)(3)(A)(i).[5] In these and other cases, a manufacturer may not sell, introduce, or deliver a motor vehicle or motor vehicle engine that has not been certified as compliant with the applicable federal "standards." CAA § 203, 42 U.S.C. § 7522(a)(1).[6]

Following enactment of section 202, several states independently acted or proposed to exercise their traditional police powers to impose their own production mandates for tailpipe emissions.[7] This threatened a balkanized system of

[5] *See id.* § 7521(b)(1)(A) (requiring that "light-duty vehicles and engines manufactured during the model year 1980 . . . contain standards which provide that such emissions may not exceed 7.0 grams per vehicle mile"); *id.* § 7521(b)(1)(B) (mandating that "light-duty vehicles and engines manufactured during model years 1977 through 1980 shall contain standards that [oxides of nitrogen] emissions . . . may not exceed 2.0 grams per vehicle mile").

[6] *See also* CAA § 206, 42 U.S.C. § 7525(a)(1) ("The Administrator "shall test . . . any new motor vehicle . . . submitted by a manufacturer to determine whether such vehicle . . . conforms with the regulations prescribed under section [202]"); CAA § 202, 42 U.S.C. § 7521(b)(3) (entitling "manufacturer[s]" to seek a waiver from EPA of certain standards).

[7] *See Motor & Equip. Mfrs. Ass'n* v. *EPA*, 627 F.2d at 1108-09 & nn.25, 26; H.R. Rep. No. 89-899, at 5 (referencing "steps taken or proposed in many States to deal with motor vehicle pollution"); Currie, *supra*, 68 Mich. L. Rev. at 1089 ("Despite the 1965 federal standards, several states proceeded to consider or to enact legislation concerning vehicle emissions."); U.S. Dep't of Health, Education, and Welfare, *A Digest of State Air Pollution Laws* 101 (1967 ed.) (discussing 1967 Connecticut law authorizing agency to require "an effective air pollution control device" and "standards for such devices"); *id.* at 337 (discussing 1966 New Jersey law

state and federal emission "standards," under which motor vehicle manufacturers might have faced dozens of vastly divergent regulatory obligations in designing and producing vehicles. "The auto industry . . . was adamant that the nature of their manufacturing mechanism required a single national standard in order to eliminate undue economic strain on the industry." S. Rep. No. 90-403, at 33; *see also* H.R. Rep. No. 95-294, at 309-311 (1977) (section 209 responded to the concern that "vehicle manufacturers not be subject to 50 different sets of requirements relating to emission controls which would unduly burden interstate commerce").

The competing concerns of the states and the motor vehicle manufacturers form the backdrop to Congress's enactment of section 209(a) in 1967.

> [B]oth the history and text of the Act show that the . . . preemption section was made not to hamstring localities in their fight against air pollution but to prevent the burden on interstate commerce which would result if, instead of uniform standards, every state and locality were left free to impose different standards for exhaust emission control . . . for the manufacture and sale of new cars.

Allway Taxi, Inc. v. *City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y.), *aff'd*, 468 F.2d 624 (2d Cir. 1972). The debate was "between states, which wanted to preserve their traditional role in regulating motor vehicles, and the manufacturers, which wanted to avoid the economic disruption latent in having to meet fifty-one separate sets of emissions control requirements." *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1109; *cf. Motor Vehicle Mfrs. Ass'n of United States, Inc.* v. *New York State Dep't of Envt'l Conservation*, 79 F.3d 1298, 1301 (2d Cir. 1996) (noting "competing goals of Con-

authorizing agency to "establish[ ] standards and requirement for control of air contaminants from motor vehicles"); *id.* at 357 (discussing 1966 New York law authorizing agency to implement "an air contaminant emission control system . . . in accordance with standards promulgated by the Air Pollution Control Commission").

gress' clean air legislation, one of which is to protect manufacturers from regulatory chaos by preventing states from enacting multiple contradictory emissions standards, and the other of which is to safeguard public health by reducing the levels of toxic pollutants spouting from automobile tailpipes into the air we all must breathe"). Congress resolved that debate in section 209(a) by making exclusive the federal power under section 202 to impose "standards"—*i.e.*, production mandates—while otherwise leaving states and localities with authority sufficient to respond to particularized motor vehicle pollution problems.[8]

2. EPA itself has equated the meaning of "standard" in section 209(a) with its meaning in section 202 and has repeatedly explained that the term includes, as an essential element, a "production mandate"—a fact that may explain EPA's unorthodox and otherwise puzzling omission from the Justice Department's brief in support of petitioners. In 1999, for example, EPA stated that a section 209(a) "standard" is a "*requirement to produce* a certain number or percentage of vehicles ('production requirement') to meet a numerical emissions limitation" or "a numerical emission limitation and the number of vehicles that are subject to that limitation."[9] Twenty years earlier, in 1979, EPA similarly

[8] The legislative history of the preemption section reinforces that conclusion. The author of S. 780—which was enacted without any material change to what is now section 209(a)—explained that preemption extended only to "the *right to set standards* on automobile exhaust emissions." 113 Cong. Rec. 19173 (1967) (statement of Sen. Muskie) (emphasis added). That understanding of the "standards relating to the control of emissions" language was also shared by the relevant House and Senate committees. *See* S. Rep. No. 90-403, at 34 ("The committee has provided for Federal preemption of *the right to set standards* on new motor vehicles and new motor vehicle engines *only*.") (emphasis added); H.R. Rep. No. 90-728, at 36 (section 209(a) preempts "*the power [of states] to set standards on emissions* from new motor vehicles and engines") (emphasis added).

[9] *See* Letter from Gary S. Guzy (EPA) to the Honorable Thomas F. Reilly, Sept. 15, 1999 ("EPA Op. Letter"), at 8 (submitted in response to primary jurisdiction referral in *American Auto. Mfrs. Ass'n* v. *Massachu-*

explained—and the D.C. Circuit agreed—that "the word 'standards' connotes a numerical value setting the quantitative level of permitted emissions of pollutants by a new motor vehicle." *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1111; *see also id.* at 1111-1112 (agreeing that "standards" are "quantitative levels of emissions," such as "a regulation limiting motor vehicle emissions of carbon monoxide to 3.4 grams per mile").

Although the Justice Department notes that the term can include more than "quantitative measures of tailpipe emissions *for particular vehicles*," that is only because (as the Department concedes) EPA and Congress have also exercised the federal standard-setting authority to "allow [some] manufacturers to choose what mix of vehicles to produce to attain fleetwide averages." U.S. Br. 15 n.3 (emphasis added); *see also id.* at 23 n.7. Either way, the term signifies a production mandate addressed to, and imposed on, manufacturers. The Fleet Rules impose nothing of the kind.

Similarly, the Justice Department contends that, under EPA's usage, "the term 'standard' includes both emissions-related criteria and the imposition of such criteria on an identified group of vehicles." U.S. Br. 23 n.7. But this simply confirms that, as applied to manufacturers, "criteria" and "the imposition of such criteria" are both necessary elements of a production mandate. On that issue, EPA can speak for itself: "the requirement to produce vehicles is in fact part of the emission standard," and "[t]his combination of an emissions limit and a requirement to produce vehicles meeting that limit is key to evaluating certain central issues in stan-

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setts Dep't of Envt'l Protection, 163 F.3d 74 (1st Cir. 1998)) (App. 70a). As discussed at note 15, *infra*, the First Circuit ultimately accepted EPA's interpretation and determined that Massachusetts's zero-emissions vehicle ("ZEV") sales-quota program—which included "numerical production requirements"—imposed a "standard" as used in section 209(a). *Association of Int'l Auto. Mfrs., Inc.* v. *Commissioner, Mass. Dep't of Envt'l Prot.*, 208 F.3d 1, 6-7 (1st Cir. 2000); *accord, American Auto. Mfrs. Ass'n* v. *Cahill*, 152 F.3d 196, 200 (2d Cir. 1998) (holding preempted similar New York ZEV program).

dard setting." EPA Op. Letter, at 9 (App. 70a-71a). In sum, EPA has consistently interpreted the state "standards" preempted by section 209(a) as coterminous with the federal production mandates imposed under section 202. *See id.* ("There is little reason to believe that Congress intended a substantially different interpretation of standard under section 209 than that under section 202."); *accord American Auto. Mfrs. Ass'n* v. *Commissioner*, 998 F. Supp. 10, 22 (D. Mass.), *aff'd*, 208 F.3d 1 (1st Cir. 1997) ("[I]t is unlikely that Congress intended the term "standards" to have a different meaning when referring to state standards as compared to federal standards.").

3. There is no basis for petitioners' contrary view that the scope of the term "standard" in section 209(a)'s preemption provision greatly *exceeds* the scope of the identical term in section 202. To begin with, that position contradicts the traditional "presumption against the pre-emption of state police power regulations," which prescribes "a narrow interpretation" of express preemption provisions in cases of doubt. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks and citation omitted); *see also DeBuono* v. *NYSA-ILA Med. Clinical Servs. Fund*, 520 U.S. 806, 814 (1997). In this regard, petitioners blink reality when they claim (Br. 22) that there is "no 'tradition' of state regulation of motor vehicle emissions." As discussed, this Court has made clear that regulation of air pollution falls squarely within "even the most traditional concept of . . . the police power." *Huron*, 362 U.S. at 442. And a number of states had begun regulating, or had made plans to regulate, tailpipe emissions around the time the federal government imposed production mandates of its own. *See supra* p. 21 & note 7; *compare United States* v. *Locke*, 529 U.S. 89, 108 (2000) (addressing state laws "bear[ing] upon national and international maritime commerce," an area in which "Congress has legislated . . . from the earliest days of the Republic"). Indeed, even the Justice Department acknowledges

the states' "traditional role in regulating motor vehicles." U.S. Br. 19.[10]

In addition, petitioners' expansive definition of the pre-empted "standards" would create a mismatch not just between section 209(a) and section 202, but also between section 209(a) and section 209(b). Section 209(b) permits California to adopt "standards" of its own so long as they are "consistent with section [202]" and as "protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543(b)(1); *see also* S. Rep. No. 90-403, at 33 (noting that California "standards on automobile emissions" may "be more stringent than national standards"). But comparing

[10] As petitioners note (Br. 22), Justice Douglas's opinion for the Court in *Washington* v. *General Motors Corp.*, 406 U.S. 109 (1972), contains the unelaborated statement that "Congress has largely pre-empted the field with regard to 'emissions from new motor vehicles.'" *Id.* at 114 (quoting a portion of the then-current version of section 209(a)). The Court's only holding in that case, however, was a decision not to exercise its original jurisdiction over an antitrust suit that various states had brought against the major auto makers. The statement in question was *dictum*, and indeed the Court's decision as a whole cuts *in favor of* the construction of section 209(a) adopted by the lower courts in this case.

The plaintiff states in *Washington* had alleged a conspiracy among the manufacturers "to restrain the development of motor vehicle air pollution control equipment" and had sought, among other things, "an injunction requiring the [manufacturers] to undertake 'an accelerated program of spending, research and development designed to produce a fully effective pollution control device or devices and/or pollution free engine at the earliest feasible date.'" 406 U.S. at 111-112. Put differently, the states sought to impose through the back door of antitrust litigation what section 209(a) keeps them from imposing through the front door of prescriptive regulation: *production mandates*, as to which Congress has indeed "pre-empted the field." *Id.* at 114. The Court nonetheless viewed the states' claims as sufficiently plausible on the merits that it decided to "remit the parties to the resolution of their controversies in the customary forum"—the district court—on the ground that those courts would be more capable of taking into account the "geophysical characteristics which define local and regional airsheds" and thus of establishing "[t]he nature of the remedy which may be necessary, *if a case for relief is made out.*" *Id.* at 114-15 (emphasis added). Here, of course, the District seeks no "relief" whatsoever against the manufacturers, because its regulations address only the purchasing decisions of fleet operators within the District's jurisdiction.

California's "standards" to "applicable Federal standards" can be a meaningful exercise only if the former fall within the same category of regulatory requirements as the latter. And it would make no sense to construe the term "standards" to mean one thing in section 209(b) but something different or broader in section 209(a). Indeed, "[t]he plain meaning of the statute indicates that Congress intended to make the waiver power [in section 209(b)] coextensive with the preemption provision [in section 209(a)]." *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1107.

The Justice Department suggests that the section 209(b) waiver process makes it more palatable to construe section 209(a)'s preemption expansively, reasoning that section 209(b) ensures "a balance between the national interest in uniform federal requirements and the state interest in developing additional initiatives in response to local conditions." U.S. Br. 21. This logic is untenable for at least two reasons. First, the waiver process is unavailable to any of the 49 states *other than* California (except in the limited sense that, under section 177, they may adopt exactly the same standards that California adopts). As to those states, the section 209(b) process would neither preserve "additional initiatives in response to local conditions" nor, more generally, "balance" the unduly broad interpretation of section 209(a) that petitioners seek here on a nationwide basis.

Second, the relevant rule of construction is that, in cases of doubt, express preemption provisions should be given "a narrow interpretation" to accommodate a state's sovereign interest in exercising its traditional police powers. *Medtronic*, 518 U.S. at 485. That rule has particular force in the Clean Air Act context, where states and their subdivisions confront a zero-sum game: if overall reductions in air pollution that are mandated by federal law cannot come from the mobile sources that most aggravate the problem, they must

come from other sources.[11] Section 209(b) notwithstanding, the question here remains whether section 209(a) manifests a clear congressional intent to strip the states of their traditional authority to reduce air pollution through targeted fleet purchasing restrictions tailored to local clean air problems. If the answer to that question is no, as it is for the reasons discussed, it would be as inappropriate and intrusive as it is unnecessary to make California and the District jump through bureaucratic hoops in speculative pursuit of ultimate EPA approval of those restrictions. Where inessential to serve some clear and overriding federal objective, "the inevitable effect of any such law which forces any one of the States to entreat federal authorities in faraway places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 359-360 (1966) (Black, J., concurring in part and dissenting in part).

Finally, petitioners' position would give rise to yet another statutory anomaly, this one involving the relationship between the first sentence of section 209(a), on which petitioners rely, and the second sentence, which by its plain terms and by petitioners' admission (Pet. Br. 28) is inapplicable here. That second sentence prevents states from requiring a "certification, inspection, or any other approval relating to the control of emissions . . . as a condition precedent to the initial retail sale, titling (if any), or registration of

[11] The District, for example, must meet federal air-quality requirements for particulate matter by 2006, *see* CAA § 188, 42 U.S.C. § 7513(c)(2), (e); 68 Fed. Reg. 19316 (Apr. 18, 2003); and for ozone by 2010, *see* CAA § 181, 42 U.S.C. § 7511(a)(1); 65 Fed. Reg. 6091, 6100 (Feb. 8, 2000). Although so much of the ozone and particulate-matter pollution in the Los Angeles Basin—as elsewhere—derives from diesel exhaust, *see supra* p. 10, petitioners seek section 209(a) immunity from any state regulation "linked in some manner" (Pet. Br. 28) to motor vehicle emissions. This effort to hobble local efforts at targeted remediation would inefficiently off-load onto stationary or other mobile sources the burden of complying with federal air-quality requirements.

such motor vehicle." 42 U.S.C. § 7543(a). If petitioners' capacious definition of "standards" in the first sentence of section 209(a) were correct, the second sentence would be surplusage, because most or all of the prohibited state requirements would qualify as "standards," already preempted by the first sentence, by virtue of "referenc[ing]" the "characteristics of a motor vehicle's emissions." Pet. Br. 26. "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks and citation omitted); *accord Duncan* v. *Walker*, 533 U.S. 167, 174 (2001). The proper way to honor that principle here is to equate the "standards" preempted by section 209(a) with the production mandates compelled by section 202.

II. PETITIONERS' CONSTRUCTION OF SECTION 209(a) IS IRREMEDIABLY OVERINCLUSIVE.

Petitioners' definition of "standard" should be rejected not just because it sweeps much more broadly than the cognate meaning of that term in section 202 and the most applicable dictionary definition, departs from EPA's own pronouncements, and produces the interpretive anomalies discussed above, but also because—in practice—it would preempt far too much.

As noted, petitioners construe "standard" (Br. 28) to include any state or local law that contains an "express reference to emission characteristics or design criteria" or that is "linked in some other manner to control of motor vehicle emissions." But that definition encompasses a broad range of state-level clean-air initiatives that, by general consensus, Congress did *not* mean to preempt. The Justice Department states (Br. 17 n.4), for example, that section 209(a)'s preemption of "standards" does "not generally reach state voluntary or incentive programs that merely encourage vehicle manufacturers to sell, or consumers to buy, vehicles with particu-

lar emission characteristics." Those incentive programs—of which there have been many throughout the nation[12]—necessarily contain an "express reference to emissions characteristics or design criteria" (Pet. Br. 28). For example, a $500 rebate (or equivalent tax incentive) for the purchase of a hybrid car necessarily conditions consumer benefits on the purchase of vehicles with "particular emissions characteristics." And the creation of such benefits necessarily enhances the market for such vehicles and "encourage[s] vehicle manufacturers to sell" them (U.S. Br. 17 n.4). But, as the

[12] Examples of current or recent incentive programs include: Ariz. Rev. Stat. §§ 28-5801, 28-5805 (2003) (reduced license tax on alternative-fuel vehicles); Cal. Health & Safety Code §§ 44260-44265 (2002) (grant for purchase of zero-emission vehicles); *id.* §§ 44275-44299.1 (2003) (grant for projects within the state involving purchase of low-emission vehicles); *id.* §§ 44299.50-44299.55 (grant for projects within Sacramento involving purchase of low-emission vehicles); *id.* §§ 44299.75-44299.79 (grant for projects within San Joaquin Valley involving purchase of low-emission vehicles); *id.* §§ 44299.80-44299.85 (grant for projects in marine terminal areas of San Francisco and Los Angeles involving purchase of low-emission vehicles); Colo. Rev. Stat. § 39-26-114(22) (2003) (no state sales tax on low-emission vehicles); Conn. Gen. Stat. § 12-412(67)-12-412(68) (2003) (no state sales tax on alternative-fuel vehicles and conversion equipment); Ga. Code Ann. § 48-7-40.16 (2003) (tax credit of up to $5,000 for purchase of low-emission or zero-emission vehicles); 415 Ill. Comp. Stat. 120/30 (2003) (rebate of up to $4,000 for purchase of alternative-fuel vehicles); Kan. Stat. Ann. § 79-32,201 (2002) (tax credit for purchase of alternative-fuel vehicles); Md. Code Ann., Transp., § 13-815 (2003) (tax credit of up to $2,000 for purchase of low-emission vehicles); Me. Rev. Stat. Ann. tit. 36, § 1760(79) (2003) (tax exemption of portion of cost for clean-fuel vehicles); N.Y. Tax Law § 606(p) (2003) (tax credit of up to $10,000 for purchase of electric or clean-fuel vehicles); Or. Rev. Stat. § 316.116 (2001) (tax credit of up to $1,500 for purchase of alternative-fuel vehicles); R.I. Gen. Laws § 44-18-30(53) (2002) (reduced state sales tax for purchase of alternative-fuel vehicles); Utah Code Ann. § 59-10-127 (2003) (tax credit of up to $3,000 for purchase of alternative-fuel vehicles); Va. Code Ann. § 58.1-438.1 (2003) (tax credit for purchase of clean-fuel vehicles); W. Va. Code § 11-6D-5 (2003) (tax credit up to $50,000 for purchase of alternative-fuel vehicles). In addition, the Internal Revenue Code contains a range of substantial federal tax incentives for the purchase of clean vehicles. *See* 26 U.S.C. § 30 (tax credit of up to $4,000 for purchase of electric vehicles); *id.* § 179A (tax deduction of up to $50,000 for purchase of clean-fuel vehicles).

Justice Department acknowledges (*id.*), no one could seriously maintain that section 209(a) preempts such measures. Indeed, to reduce dependence on foreign oil, the Energy Policy Act of 1992 expressly authorizes the Department of Energy to make states eligible for "grants of Federal financial assistance" *if* they enlarge the market for alternative-fuel vehicles by (among other things) creating "exemption[s] from State sales tax or other State or local taxes or surcharges . . . with respect to alternative fueled vehicles, alternative fuels, or alternative fueling facilities[.]" 42 U.S.C. § 13235(a)(3)(A), (b)(1)(B) & (C). That provision would make no sense if Congress had preempted such incentive programs under section 209(a).[13]

The basic problem for petitioners is that their definition of "standard"—under which anything is preempted if it refers to or "is linked in some other manner to control of motor vehicle emissions" (Pet. Br. 28)—would swallow up these incentive programs along with the fleet purchasing require-

[13] The Justice Department obliquely suggests in a footnote (Br. 18 n.5) that sections 182(g)(4) and 249(f)(3) of the Clean Air Act, by addressing particular types of state incentive programs, indicate by negative implication that certain other types of incentive programs are impermissible. *See* 42 U.S.C. §§ 7511a(g)(4), 7589(f)(3). Any such argument—which, tellingly, petitioners have never made—is untenable. These two provisions specify ways in which states with non-attainment areas may *discharge* their federal *obligations* to provide an effective "state implementation plan." *See supra* pp. 4-5. That is why, for example, section 249(f)(3)(A) lists, as one such option, a state's imposition of a "registration fee" for non-clean-fuel vehicles "in the amount of *at least* 1 percent of the cost the vehicle." 42 U.S.C. § 7589(f)(3)(A) (emphasis added). It would be absurd to cite that provision as a basis for construing the Act to permit substantial penalties of this type for the purchase of non-clean-fuel vehicles but to preempt all tax exemptions and other benefits for the purchase of clean-fuel vehicles. And, as noted, it would be inconsistent with the Energy Policy Act, which assumes that states have broad authority to adopt the latter approach. Finally, section 249(f)(4) of the Act is also inapposite, because it does not apply within California and merely precludes non-California states that avail themselves of the section 249(f)(3) compliance option from imposing "any production or sales mandate." 42 U.S.C. § 7589(f)(4). As discussed, the Fleet Rules impose no such "mandate."

ments at issue here. This problem arises not from any slip of the pen in petitioners' opening brief, but from an unavoidable flaw at the heart of any argument for construing section 209(a) to preempt these Fleet Rules or any other state or local environmental program that might somehow affect the motor vehicle industry without imposing a production mandate. Petitioners *must* resort to their plainly overbroad definition of "standard," under which ordinary state incentive programs would be abruptly invalidated, because there is no valid limiting principle, faithful to the text or purposes of the Clean Air Act, that could *include* the Fleet Rules within the scope of preempted "standards" but nonetheless *exclude* the incentive programs—whose very purpose is to "encourage vehicle manufacturers to sell, or consumers to buy, vehicles with particular emission characteristics." U.S. Br. 17 n.4.

Although petitioners ignore this problem altogether, preferring to leave it for their reply brief, the Justice Department grasps for a solution in a footnote (Br. 17 n.4) and, in the process, reveals why no solution is available. The Department first suggests that the reason incentive programs do not fall within the scope of section 209(a) is that "they do not impose 'enforce[able]' requirements." *Id.* (quoting section 209(a)) (alteration in original). While difficult to discern, the Department's argument is apparently that, even if incentive programs qualified as "standards," states would not violate section 209(a) by adopting them, because those states would not be "enforc[ing]" these "standards" against anyone. But this line of analysis makes no sense. For one thing, section 209(a) forbids states either to "attempt to enforce" *or* to "adopt" any preempted "standard." If an incentive program otherwise qualified as a "standard relating to the control of emissions," section 209(a) would preempt any state or local decision to "adopt" such a program. For another thing, the text of section 209 as a whole precludes drawing the line under section 209(a) between emissions-related regulations that impose "requirements" and those that do not. As discussed above, section 209(a) preempts "any standard relating to the control of emissions" of on-road vehicles, whereas

the parallel provision of section 209(e) preempts "any standard or requirement relating to the control of emissions" of "nonroad" vehicles. The striking difference in language between these two companion provisions confirms that section 209(a) does *not* preempt at least some requirements "relating to the control of emissions." *See supra* Point I.1.

Quite apart from that textual consideration, there is also no logical basis consistent with the purposes of section 209(a) for distinguishing between "enforceable" and "non-enforceable" clean air policies so long as such policies do not impose production obligations on manufacturers. Although the Fleet Rules are compulsory as to *buyers* while incentive programs are not, the relevant perspective is that of the *manufacturers*. Section 209(a) was designed, after all, to protect manufacturers from any compulsory obligation to produce additional vehicle types beyond those mandated by the federal government and California,[14] not to guarantee

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[14] *See* S. Rep. No. 90-403, at 33 (section 209(a) responds to automakers' desire for "a single national standard in order to eliminate undue economic strain on the industry"); H.R. Rep. No. 95-294, at 309-311 (section 209(a) designed so that "vehicle manufacturers [would] not be subject to 50 different sets of requirements relating to emission controls"); *cf. 1990 Legislative History*, at 1022 ("[A] manufacturer could claim 'undue burden' if a state that adopted the California standard applied enforcement procedures that would require material[] changes in the manufacture of such vehicles, i.e., production of a third car."); *id.* at 950-951 (addressing "legitimate concern" of automakers "that different programs in different States could result in a requirement for a third or fourth or fifth car; that is, one that is different from either a California or a Federal vehicle").

By "prevent[ing] a chaotic situation from developing in interstate commerce in new motor vehicles," section 209(a) necessarily benefits both manufacturers and users. H.R. Rep. No. 90-728, at 21 (1967). But Congress's chosen method for avoiding that "chaotic situation" was to preempt divergent state production mandates. Thus, contrary to the suggestion of amici American Automotive Leasing Association et al. (Br. 22-23), the snippets of legislative history expressing concern for "the user" (S. Rep. No. 89-192, at 8 (1965)) refer only to the consumer benefits of limiting the sources of those mandates. Those snippets cannot plausibly be read to support any broader preemptive effect; indeed, section 209(d) permits the states to impose a wide range of divergent "use" restrictions that directly

consumers the right to buy the diesel fuel vehicles of their choice no matter where they live and no matter how severe the air pollution there. And the Fleet Rules do not compel any manufacturer to produce any particular vehicle. Indeed, for that matter, they even exempt *fleet owners* from any obligation to purchase clean fuel vehicles when such vehicles are commercially unavailable. *E.g.*, JA 30.[15]

At most, the Fleet Rules, like incentive programs, require motor vehicle manufacturers to contemplate a voluntary increase in the production of certain vehicles—specifically, the cleanest subset of vehicles within the category of fleet vehicles whose production CARB has required (with EPA's approval). For example, if no clean vehicle is currently manufactured for a particular category of fleet vehicles, one manufacturer might seek to gain a business advantage by producing the first such vehicles, because the purchasing requirements will have created a market for them. But any such incentive-based "race to the top" is hardly the type of burden that Congress sought to stave off in Section 209(a). Indeed, from a manufacturer's perspective, there is no reason in principle why a locality's fleet purchase requirements would be any more likely to spark such a race to the top, or otherwise affect manufacturing decisions, than an appropriately robust incentive program. And, as noted, no one could seriously contend that section 209(a) preempts such a program.

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affect users. *See* 42 U.S.C. § 7543(d) ("Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.").

[15] The Fleet Rules are thus markedly different from the production mandates determined to be "standards" in *Association of International Automobile Manufacturers*, *supra*, and *Cahill*, *supra*. Under the programs at issue in those cases, manufacturers were (i) required to design and produce ZEVs not otherwise mandated by EPA or CARB and (ii) required to sell ZEVs equal to two percent of their overall sales in New York and Massachusetts. *See Association of Int'l Auto. Mfrs.*, 208 F.3d at 3; *Cahill*, 152 F.3d at 199.

To paper over that problem, the Justice Department advocates (in a sentence in a footnote) a contrived and patently unworkable limitation on state incentive programs under section 209(a). On the one hand, the Department concedes that most "state voluntary or incentive programs" would be permissible because they "*merely encourage* vehicle manufacturers to sell, or consumers to buy, vehicles with particular emission characteristics." U.S. Br. 17 n.4 (emphasis added). On the other hand, plucking terms from Sherman Act jurisprudence, the Department adds that "an incentive program or related state initiative may well be preempted if it frustrates Section 209(a)'s purpose by acting as a substantial *barrier to the entry* of new motor vehicles into the marketplace." *Id.* 18 n.5 (emphasis added).

This proposed line between permissible "encouragement" and impermissible "barriers to entry" is untenable for several reasons. To begin with, the Justice Department altogether fails to (i) define "barrier to entry," (ii) explain why it would be appropriate to import that antitrust concept into a preemption analysis arising under the environmental laws, (iii) explain how incentive programs that erect such "barriers" should be distinguished from those that "merely encourage" the production and purchase of clean vehicles, or (iv) root any such distinction in the text of section 209(a). The Justice Department omits any discussion of these issues for good reason, because there is no sound legal doctrine that could be developed here. Even if the Department's proposed "line" were sensible as a matter of policy, which is doubtful, there would be no apparent reason why *courts*, rather than the political branches, should be the ones to draw it. Does a $2000 tax break for a particular vehicle erect a "barrier to the entry" of other "vehicles into the marketplace?" Presumably not[16]—but where, under the

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[16] Congress itself has included tax incentives of similar or greater magnitude throughout the Internal Revenue Code, with no apparent intent to impose "barriers to entry" of any kind. *See* 26 U.S.C. § 30 (tax credit of up to $4,000 for purchase of electric vehicles); *id.* § 179A (tax de-

Justice Department's approach, *should* that line be drawn? At what point does the effect on those unnamed "other" vehicles cross that line, and how should that effect be measured in the first place? Finally, and most important for present purposes, what basis would any court have to conclude that the fleet purchasing requirements at issue here fall into the "barrier to entry" category rather than the category for (permissible) state programs that "merely encourage vehicle manufacturers to sell ... vehicles with particular emission characteristics" (U.S. Br. 17 n.4)?

These are the sorts of fact-specific, policy-laden, *legislative* questions that Congress or EPA might be expected to address if they someday perceive a need to do so. These are *not* the sorts of questions that courts are institutionally equipped to address. The only line this Court need draw is the traditional one limiting the scope of section 209(a) to production mandates. The Fleet Rules impose no such mandate, nor do they impose *any* obligation upon manufacturers. They merely require fleet operators to choose the cleaner of those vehicles already available and certified for sale.

III. Confining Section 209(a) To Production Mandates Establishes A Sensible And Easily Administered Rule Of Decision That Should Be Revisited, If At All, Only By The Political Branches.

In contrast to the overbreadth of petitioners' position and the indeterminacy of the Justice Department's alternative, restricting the preemptive scope of section 209(a) to production mandates provides a clear, manageable distinction between permissible and impermissible local environmental initiatives. It preserves the states' traditional flexibility to respond to particular local air-quality problems while protecting manufacturers from any compulsion to produce new motor vehicles based upon more than two numerical emission levels.

duction of up to $50,000 for purchase of clean-fuel vehicles); *id.* § 29 (tax credit for production of nonconventional fuel); *id.* § 40 (tax credit for production or use of alcohol-based fuel).

Petitioners, however, deride as "nonsensical" (Br. 25) any distinction between production mandates and purchase restrictions. "Every new vehicle transaction," they assert, "involves the purchase of the vehicle by the purchaser and the sale of the vehicle by the seller." *Id.* at 25-26. That is true but quite beside the point. Requiring a fleet owner to buy a particular vehicle imposes no legal obligation on any manufacturer to alter its plans to sell that vehicle, whereas a production mandate imposes precisely such an obligation. Although petitioners may dislike that pragmatic distinction, there is nothing "nonsensical" about it.

Indeed, it is *exactly* the same distinction that Congress and the EPA have drawn in connection with the federal government's own purchasing requirements under the "clean fuel fleet program"—a point the Justice Department altogether fails to mention. Section 246 of the Clean Air Act requires states with ozone or carbon monoxide "nonattainment" areas either (i) to adopt a set of fleet purchasing requirements prescribed by the federal government, 42 U.S.C. § 7586, or (ii) to create an alternative program that achieves the same ozone and carbon monoxide reductions, *see* 42 U.S.C. § 7511a(c)(4)(B). Any state that chooses the first option must require fleet owners to purchase a specified percentage of clean-fuel vehicles and to use clean alternative fuels in those vehicles. *See* 42 U.S.C. § 7586(b). Although the federal fleet program differs in certain respects from the Fleet Rules at issue here, the underlying structure is the same. Both require certain fleet operators to purchase clean-fuel or low-emission vehicles: the Fleet Rules reference certain CARB standards, whereas the federal fleet program references standards set forth in section 243, 42 U.S.C. § 7583. But neither fleet purchasing program itself regulates or imposes any production mandate on motor vehicle manufacturers. *See* 58 Fed. Reg. 11888, 11898 (Mar. 1, 1993) (federal fleet rules are "largely voluntary" to the "auto

industry" because "[m]anufacturers will seek [program] qualification only if demand for such vehicles is sufficient").

This distinction between purchasing requirements and production mandates—the same distinction petitioners call "nonsensical"—is the explicit premise of section 246 and its accompanying regulatory scheme. As EPA explains, "in adopting the [federal fleets program], Congress made a clear choice between two alternatives: requiring auto manufacturers *to produce* and sell [clean-fuel vehicles], or creating a market for [clean-fuel vehicles] . . . by requiring fleet operators *to purchase* such vehicles[.]" 63 Fed. Reg. at 20105 (emphasis added) (App. 49a). Congress, EPA observed, deliberately chose the latter option instead of the former. Senator Carl Levin of Michigan, who ably represents Detroit automakers among his other constituents, likewise invoked the logical and practical significance of this distinction by assuring the public that the federal fleet program is "carefully designed to avoid the mandated production and sales that we all agreed to avoid." *1990 Legislative History*, at 7209. Instead, he explained, "[t]he fleets program . . . requires the purchase of low-emission vehicles by . . . operators of private, centrally fueled and centrally maintained fleets." *Id.* Senator Levin acknowledged that these compulsory purchases "will create a *substantial demand* for such cars, giving motor vehicle manufacturers a *real incentive to bring them into production.*" *Id.* (emphasis added). "However," he emphasized, "the provision does not contain any production or sales mandate, direct or indirect," *id.*—and is thus appropriate as a matter of federal policy.

In short, Congress and EPA have both embraced the very distinction that petitioners criticize as unworkable and implausible. Petitioners suggest (Br. 26) that, in an extreme and highly unlikely scenario, the widespread adoption of identical purchasing rules by states or localities could amount in practical effect to a production mandate for particular manufacturers. But that logic did not impress Congress, which created federal fleet purchasing requirements with potentially very broad application—but which nonetheless concluded that, despite their scope, such requirements are importantly different from production mandates of the sort imposed by section 202 and preempted by section 209(a). The same holds particularly true in the case of the District's Fleet Rules, which by their terms do not apply if the designated vehicle is not commercially available. *E.g.*, JA 30. And, of course, the political branches remain free to draw whatever other line they deem appropriate as circumstances warrant.

IV. Confining Section 209(a) To Production Mandates Is Consistent With Other Provisions Of The Clean Air Act.

Petitioners argue that limiting the preemptive scope of section 209(a) would be inconsistent with a variety of other provisions in the Clean Air Act. In each case, petitioners are wrong.

First, seeking to turn section 246 to their own advantage, petitioners suggest, without saying so explicitly, that Congress's establishment of a federal fleet program somehow occupies the field of fleet vehicle regulations. *See* Pet. Br. 32. As an initial matter, petitioners have waived any reliance on section 246 as a basis for preemption, because they raised no such argument either below (Pet. App. 2a n.1) or in their petition for certiorari (Pet. i). *See Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course, we do not decide questions neither raised nor resolved below."); S. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). And the argument is without merit in any event. Section 246 does not purport to authorize the states to enact otherwise-preempted fleet purchasing rules. Instead, as noted, it *requires* certain "nonattainment" states to add such rules to their "state implementation plans" unless they obtain EPA approval to pursue an alternative approach as set forth in section 182, 42 U.S.C. § 7511a(c)(4)(B).

If anything, section 246 presumes that the states retain full authority to implement fleet purchasing requirements on

their own initiative: section 246 does not use the term "standard" in describing fleet purchasing requirements, and it does not exempt such requirements from section 209(a) through a "notwithstanding" clause, as one might have expected if they were otherwise preempted. Just as important, section 246 is conspicuously omitted from the statutory list of provisions deemed by section 116 of the Act to assert exclusive federal authority over a particular subject area. *See* 42 U.S.C. § 7416 (affirming retained state authority except as provided in enumerated federal provisions); *see generally Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1107 n.20 (noting automobile industry's "difficult burden" of showing preemption under section 207 of the Clean Air Act where it is "not among" section 116's list of provisions that "Congress intended to reserve for exclusive federal regulation"). For that reason alone, section 116 squarely precludes any preemptive interpretation of section 246.

Petitioners' focus on the substantive distinctions between the federal fleet program and the Fleet Rules (*see* Br. 43-44) is beside the point, because section 246 does not prescribe *particular* federal requirements with which states must comply. Covered states are instead given the flexibility to forgo the federal fleet program in whole or in part and to adopt an alternative program of their own, so long as they persuade EPA that doing so "will achieve [equivalent] long-term reductions" in air pollution. CAA § 182, 42 U.S.C. § 7511a(c)(4)(B).[17] The considerable discretion left to the

[17] In adopting regulations under section 246, EPA expected there to "be some overlap" between the "clean fuel fleet program" and the "number of other programs being implemented or considered at national, state, or local levels, which involve the introduction of clean fuel vehicles in fleets." 56 Fed. Reg. 50196, 50199 (Oct. 3, 1991); *cf.* H.R. Rep. No. 101-490, at 177 (1990) (noting that, along with section 246, "California would be proceeding along its own path, perceived at this time as mandating similar fleet requirements plus diffusion of alternative-fueled passenger cars into the general auto market"). EPA "define[d] certain terms and resolve[d] certain issues by regulation" in order to "reduce ambiguity and increase the effectiveness of the Clean Fuel Fleet Program," but reiterated its "general view" that "program implementation be left to the states." 58 Fed. Reg. 32474, 32476 (June 10, 1993).

states belies any claim that the Clean Air Act reflects Congress's view of the only "right" way to design fleet purchasing requirements. And other federal statutes confirm the same conclusion: for example, the Energy Policy Act of 1992 gives the Department of Energy, rather than EPA, broad discretion to impose fleet purchasing requirements of its own design on a nationwide basis to reduce dependence on foreign oil. *See* 42 U.S.C. § 13257.[18] In sum, even if petitioners had preserved the issue, they would not come close to satisfying the strict standard for implied conflict or field preemption under section 246, particularly given the express reservation of state authority under section 116. *See, e.g.*, *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"); *Medtronic*, 518 U.S. at 485; *see generally English* v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990) (discussing conflict and field preemption).

Petitioners next rely on section 177, which was enacted after section 209(a) and which permits other states to adopt California's "standards"—*i.e.*, its EPA-approved production mandates—as their own. *See* 42 U.S.C. § 7507. Under section 177, opt-in states must ensure that their "standards" are "identical" to those of California. *See* 42 U.S.C. § 7507(1). This "identicality" requirement was intended to prevent those states from compelling manufacturers to produce a "third vehicle" in addition to those required by the national and California standards. *See Cahill*, 152 F.3d at 201 (section 177's "identicality" requirement avoids the burden on manufacturers of having to "comply with more than two—

[18] There are significant differences between the fleet programs established in the Energy Policy Act and the Clean Air Act. One notable example is that the former does not include any form of diesel in its definition of "alternate fuel." *Compare* 42 U.S.C. § 13211(2), *with* CAA § 241, 42 U.S.C. § 7581(2).

perhaps several—sets of emissions regulations"); H.R. Rep. No. 95-294, at 309-311 (1977) (section 177 "should not place an undue burden on vehicle manufacturers who will be required, in any event, to produce vehicles meeting the California standards for sale in California"); *1990 Legislative History*, at 1787 ("States exercising this section 177 option may not, in such adoption and enforcement, create a 'third vehicle' that is not a California vehicle or a 49-state Federal vehicle, because of the burden it would place on the motor vehicle manufacturers."). To that end, section 177 also provides that nothing in Title II of the Clean Air Act authorizes opt-in states to "prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle." 42 U.S.C. § 7507.

Petitioners rely on this provision (Br. 30-31) as indirect evidence of preemption under section 209(a), but that reliance is misplaced. As an initial matter, the District is not an "opt in" state (or a political subdivision thereof), and section 177 thus does not apply to it. And, despite petitioners' contrary suggestion (*id.*), the relevant case law strongly indicates that the Fleet Rules would not violate section 177 even if some state or locality outside of California had adopted them. *See Motor Vehicle Mfrs. Ass'n of United States, Inc.* v. *New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 536 (2d Cir. 1994) (rejecting section 177 preemption challenge to New York's much more intrusive ZEV sales quota program on the ground that, although "the ZEV quota may affect the sale of non-ZEV California-certified cars" because "the market for cars is not unlimited," " 'affect' is not the key word of § 177, the catchword is 'limit.' "); *cf. 1990 Legislative History*, at 7209 (statement of Sen. Levin) (federal fleet program "does not contain any production or sales mandate, direct or indirect," even though it undoubtedly "will create a substantial demand for such cars, giving motor vehicle manufacturers a real incentive to bring them into production"). Finally, even if section 177 *would* preempt such rules if adopted by a state other than California, there is nothing remotely anomalous as a policy matter about exempting California and its political subdivisions from the preemptive

force of that provision, given California's long-established claim as a state with unique air pollution problems and its status as the pioneer of air quality initiatives.

Finally, petitioners invoke section 209(d), which declares that, apart from the regulations expressly preempted, nothing in Part A of Title II precludes states and localities from exercising "the right otherwise to control, regulate, or restrict the use, operation or movement of registered or licensed motor vehicles." 42 U.S.C. § 7543(d). Petitioners' reliance on this provision is also misplaced. To begin with, these Fleet Rules are, in fact, a "restrict[ion]" on "the use" of particular vehicles—specifically, on their use within *fleets* defined by a certain threshold number of vehicles. Nothing in the Rules prevents any vehicle from being registered in California. Thus, although the issue was not litigated below, section 209(d) affirmatively preserves these requirements from preemption, for nothing in the Clean Air Act " 'preclude[s] a locality from setting its own standards for the licensing of vehicles for commercial use within that locality. Such regulations would cause only minimal interference with interstate commerce, since they would be directed primarily to intrastate activities and the burden of compliance would be on individual owners and not on manufacturers or distributors.' " *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1083 (D.C. Cir. 1996) (quoting *Allway Taxi*, 340 F. Supp. at 1124) (dicta).

But even if section 209(d) did not itself preserve the Fleet Rules from preemption, that could only be because it is irrelevant to the section 209(a) inquiry altogether. Although petitioners would read section 209(d) as an exhaustive compendium of the states' preserved powers (Pet. Br. 29), it is nothing of the sort. Section 209(d) is not an exception to section 209(a) itself; it is a general savings clause for Part A of Title II as a whole, and it relates only to the specific subject matter of "use" restrictions. It has no bearing on other subjects of regulation under the Clean Air Act, and it cannot justify an expansive construction of express preemption clauses that address different issues, such as motor vehicle

"standards." *Cf. Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1107 n.19 ("Subsection (d) makes clear that the preemption provision is not intended to preempt state regulation other than as expressed in subsection (a).").

CONCLUSION

The judgment of the courts below should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS

[CAA § 101] 42 U.S.C. § 7401. Congressional findings and declaration of purpose

(a) Findings

The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) Declaration

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the

development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

[CAA § 116] 42 U.S.C § 7416. Retention of State authority

Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

[CAA § 177] 42 U.S.C. § 7507. New motor vehicle emission standards in nonattainment areas

Notwithstanding section 7543(a) of this title, any State which has plan provisions approved under this part may adopt and enforce for any model year standards relating to control of emissions from new motor vehicles or new motor vehicle engines and take such other actions as are referred to in section 7543(a) of this title respecting such vehicles if—

(1) such standards are identical to the California standards for which a waiver has been granted for such model year, and

(2) California and such State adopt such standards at least two years before commencement of such model year (as determined by regulations of the Administrator).

Nothing in this section or in subchapter II of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle".

[CAA § 202] 42 U.S.C. § 7521. Emission standards for new motor vehicles or new motor vehicle engines

(a) Authority of Administrator to prescribe by regulation

Except as otherwise provided in subsection (b) of this section—

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

(2) Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

(3)(A) In general

(i) Unless the standard is changed as provided in subparagraph (B), regulations under paragraph (1) of this subsection applicable to emissions of hydrocarbons, carbon monoxide, oxides of nitrogen, and particulate matter from classes or categories of heavy-duty vehicles or engines manufactured during or after model year 1983 shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to cost, energy, and safety factors associated with the application of such technology.

(ii) In establishing classes or categories of vehicles or engines for purposes of regulations under this paragraph, the Administrator may base such classes or categories on gross vehicle weight, horsepower, type of fuel used, or other appropriate factors.

(B) Revised standards for heavy duty trucks

(i) On the basis of information available to the Administrator concerning the effects of air pollutants emitted from heavy-duty vehicles or engines and from other sources of mobile source related pollutants on the public health and welfare, and taking costs into account, the Administrator may promulgate regulations under paragraph (1) of this subsection revising any standard promulgated under, or before the date of, the enactment of the Clean Air Act Amendments of 1990 (or previously revised under this subparagraph) and applicable to classes or categories of heavy-duty vehicles or engines.

(ii) Effective for the model year 1998 and thereafter, the regulations under paragraph (1) of this subsection applicable to emissions of oxides of nitrogen (NOx) from gasoline and diesel-fueled heavy duty trucks shall contain standards which provide that such emissions may not exceed 4.0 grams per brake horsepower hour (gbh).

(C) Lead time and stability

Any standard promulgated or revised under this paragraph and applicable to classes or categories of heavy-duty vehicles or engines shall apply for a period of no less than 3 model years beginning no earlier than the model year commencing 4 years after such revised standard is promulgated.

(D) Rebuilding practices

The Administrator shall study the practice of rebuilding heavy-duty engines and the impact rebuilding has on engine emissions. On the basis of that study and other information available to the Administrator, the Administrator may prescribe requirements to control rebuilding practices, including standards applicable to emissions from any rebuilt heavy-duty engines (whether or

not the engine is past its statutory useful life), which in the Administrator's judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare taking costs into account. Any regulation shall take effect after a period the Administrator finds necessary to permit the development and application of the requisite control measures, giving appropriate consideration to the cost of compliance within the period and energy and safety factors.

(E) Motorcycles

For purposes of this paragraph, motorcycles and motorcycle engines shall be treated in the same manner as heavy-duty vehicles and engines (except as otherwise permitted under section 7525(f)(1) of this title) unless the Administrator promulgates a rule reclassifying motorcycles as light-duty vehicles within the meaning of this section or unless the Administrator promulgates regulations under subsection (a) of this section applying standards applicable to the emission of air pollutants from motorcycles as a separate class or category. In any case in which such standards are promulgated for such emissions from motorcycles as a separate class or category, the Administrator, in promulgating such standards, shall consider the need to achieve equivalency of emission reductions between motorcycles and other motor vehicles to the maximum extent practicable.

(4)(A) Effective with respect to vehicles and engines manufactured after model year 1978, no emission control device, system, or element of design shall be used in a new motor vehicle or new motor vehicle engine for purposes of complying with requirements prescribed under this subchapter if such device, system, or element of design will cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function.

(B) In determining whether an unreasonable risk exists under subparagraph (A), the Administrator shall consider, among other factors, (i) whether and to what extent the use of any device, system, or element of design

causes, increases, reduces, or eliminates emissions of any unregulated pollutants; (ii) available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such device, system, or element of design, and (iii) the availability of other devices, systems, or elements of design which may be used to conform to requirements prescribed under this subchapter without causing or contributing to such unreasonable risk. The Administrator shall include in the consideration required by this paragraph all relevant information developed pursuant to section 7548 of this title.

(5)(A) If the Administrator promulgates final regulations which define the degree of control required and the test procedures by which compliance could be determined for gasoline vapor recovery of uncontrolled emissions from the fueling of motor vehicles, the Administrator shall, after consultation with the Secretary of Transportation with respect to motor vehicle safety, prescribe, by regulation, fill pipe standards for new motor vehicles in order to insure effective connection between such fill pipe and any vapor recovery system which the Administrator determines may be required to comply with such vapor recovery regulations. In promulgating such standards the Administrator shall take into consideration limits on fill pipe diameter, minimum design criteria for nozzle retainer lips, limits on the location of the unleaded fuel restrictors, a minimum access zone surrounding a fill pipe, a minimum pipe or nozzle insertion angle, and such other factors as he deems pertinent.

(B) Regulations prescribing standards under subparagraph (A) shall not become effective until the introduction of the model year for which it would be feasible to implement such standards, taking into consideration the restraints of an adequate leadtime for design and production.

(C) Nothing in subparagraph (A) shall (i) prevent the Administrator from specifying different nozzle and fill neck sizes for gasoline with additives and gasoline without additives or (ii) permit the Administrator to require a

specific location, configuration, modeling, or styling of the motor vehicle body with respect to the fuel tank fill neck or fill nozzle clearance envelope.

(D) For the purpose of this paragraph, the term "fill pipe" shall include the fuel tank fill pipe, fill neck, fill inlet, and closure.

(6) Onboard vapor recovery

Within 1 year after November 15, 1990, the Administrator shall, after consultation with the Secretary of Transportation regarding the safety of vehicle-based ("onboard") systems for the control of vehicle refueling emissions, promulgate standards under this section requiring that new light- duty vehicles manufactured beginning in the fourth model year after the model year in which the standards are promulgated and thereafter shall be equipped with such systems. The standards required under this paragraph shall apply to a percentage of each manufacturer's fleet of new light-duty vehicles beginning with the fourth model year after the model year in which the standards are promulgated. The percentage shall be as specified in the following table:

IMPLEMENTATION SCHEDULE FOR ONBOARD VAPOR RECOVERY REQUIREMENTS

Model year commencing after standards promulgated	Percentage *
Fourth	40
Fifth	80
After Fifth	100

*Percentages in the table refer to a percentage of the manufacturer's sales

The standards shall require that such systems provide a minimum evaporative emission capture efficiency of 95 percent. The requirements of section 7511a(b)(3) of this title (relating to stage II gasoline vapor recovery) for areas classified under section 7511 of this title as moderate for ozone shall not apply after promulgation of such standards and the Administrator may, by rule, revise or waive the application of the requirements of such section 7511a(b)(3) of

this title for areas classified under section 7511 of this title as Serious, Severe, or Extreme for ozone, as appropriate, after such time as the Administrator determines that onboard emissions control systems required under this paragraph are in widespread use throughout the motor vehicle fleet.

(b) Emissions of carbon monoxide, hydrocarbons, and oxides of nitrogen; annual report to Congress; waiver of emission standards; research objectives

(1)(A) The regulations under subsection (a) of this section applicable to emissions of carbon monoxide and hydrocarbons from light-duty vehicles and engines manufactured during model years 1977 through 1979 shall contain standards which provide that such emissions from such vehicles and engines may not exceed 1.5 grams per vehicle mile of hydrocarbons and 15.0 grams per vehicle mile of carbon monoxide. The regulations under subsection (a) of this section applicable to emissions of carbon monoxide from light-duty vehicles and engines manufactured during the model year 1980 shall contain standards which provide that such emissions may not exceed 7.0 grams per vehicle mile. The regulations under subsection (a) of this section applicable to emissions of hydrocarbons from light-duty vehicles and engines manufactured during or after model year 1980 shall contain standards which require a reduction of at least 90 percent from emissions of such pollutant allowable under the standards under this section applicable to light-duty vehicles and engines manufactured in model year 1970. Unless waived as provided in paragraph (5), regulations under subsection (a) of this section applicable to emissions of carbon monoxide from light-duty vehicles and engines manufactured during or after the model year 1981 shall contain standards which require a reduction of at least 90 percent from emissions of such pollutant allowable under the standards under this section applicable to light-duty vehicles and engines manufactured in model year 1970.

(B) The regulations under subsection (a) of this section applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during model years 1977

through 1980 shall contain standards which provide that such emissions from such vehicles and engines may not exceed 2.0 grams per vehicle mile. The regulations under subsection (a) of this section applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during the model year 1981 and thereafter shall contain standards which provide that such emissions from such vehicles and engines may not exceed 1.0 gram per vehicle mile. The Administrator shall prescribe standards in lieu of those required by the preceding sentence, which provide that emissions of oxides of nitrogen may not exceed 2.0 grams per vehicle mile for any light-duty vehicle manufactured during model years 1981 and 1982 by any manufacturer whose production, by corporate identity, for calendar year 1976 was less than three hundred thousand light-duty motor vehicles worldwide if the Administrator determines that—

(i) the ability of such manufacturer to meet emission standards in the 1975 and subsequent model years was, and is, primarily dependent upon technology developed by other manufacturers and purchased from such manufacturers; and

(ii) such manufacturer lacks the financial resources and technological ability to develop such technology.

(C) The Administrator may promulgate regulations under subsection (a)(1) of this section revising any standard prescribed or previously revised under this subsection, as needed to protect public health or welfare, taking costs, energy, and safety into account. Any revised standard shall require a reduction of emissions from the standard that was previously applicable. Any such revision under this subchapter may provide for a phase-in of the standard. It is the intent of Congress that the numerical emission standards specified in subsections (a)(3)(B)(ii), (g), (h), and (i) of this section shall not be modified by the Administrator after November 15, 1990, for any model year before the model year 2004.

(2) Emission standards under paragraph (1), and measurement techniques on which such standards are based (if not promulgated prior to November 15, 1990), shall be promulgated by regulation within 180 days after November 15, 1990.

(3) For purposes of this part—

(A)(i) The term "model year" with reference to any specific calendar year means the manufacturer's annual production period (as determined by the Administrator) which includes January 1 of such calendar year. If the manufacturer has no annual production period, the term "model year" shall mean the calendar year.

(ii) For the purpose of assuring that vehicles and engines manufactured before the beginning of a model year were not manufactured for purposes of circumventing the effective date of a standard required to be prescribed by subsection (b) of this section, the Administrator may prescribe regulations defining "model year" otherwise than as provided in clause (i).

(B) Repealed. Pub.L. 101-549, Title II, § 230(1), Nov. 15, 1990, 104 Stat. 2529.

(C) The term "heavy duty vehicle" means a truck, bus, or other vehicle manufactured primarily for use on the public streets, roads, and highways (not including any vehicle operated exclusively on a rail or rails) which has a gross vehicle weight (as determined under regulations promulgated by the Administrator) in excess of six thousand pounds. Such term includes any such vehicle which has special features enabling off-street or off-highway operation and use.

(3) [FN1] Upon the petition of any manufacturer, the Administrator, after notice and opportunity for public hearing, may waive the standard required under subparagraph (B) of paragraph (1) to not exceed 1.5 grams of oxides of nitrogen per vehicle mile for any class or category of light-duty vehicles or engines manufactured by such manufacturer during any period of up to four model years beginning after the model year 1980 if the manufacturer

demonstrates that such waiver is necessary to permit the use of an innovative power train technology, or innovative emission control device or system, in such class or category of vehicles or engines and that such technology or system was not utilized by more than 1 percent of the light-duty vehicles sold in the United States in the 1975 model year. Such waiver may be granted only if the Administrator determines—

(A) that such waiver would not endanger public health,

(B) that there is a substantial likelihood that the vehicles or engines will be able to comply with the applicable standard under this section at the expiration of the waiver, and

(C) that the technology or system has a potential for long-term air quality benefit and has the potential to meet or exceed the average fuel economy standard applicable under the Energy Policy and Conservation Act [42 U.S.C.A. § 6201 et seq.] upon the expiration of the waiver.

No waiver under this subparagraph [FN2] granted to any manufacturer shall apply to more than 5 percent of such manufacturer's production or more than fifty thousand vehicles or engines, whichever is greater.

(c) Feasibility study and investigation by National Academy of Sciences; reports to Administrator and Congress; availability of information

(1) The Administrator shall undertake to enter into appropriate arrangements with the National Academy of Sciences to conduct a comprehensive study and investigation of the technological feasibility of meeting the emissions standards required to be prescribed by **the Administrator by subsection (b) of this section.**

(2) Of the funds authorized to be appropriated to the Administrator by this chapter, such amounts as are required shall be available to carry out the study and investigation authorized by paragraph (1) of this subsection.

(3) In entering into any arrangement with the National Academy of Sciences for conducting the study and investigation authorized by paragraph (1) of this subsection, the Administrator shall request the National Academy of Sciences to submit semiannual reports on the progress of its study and investigation to the Administrator and the Congress, beginning not later than July 1, 1971, and continuing until such study and investigation is completed.

(4) The Administrator shall furnish to such Academy at its request any information which the Academy deems necessary for the purpose of conducting the investigation and study authorized by paragraph (1) of this subsection. For the purpose of furnishing such information, the Administrator may use any authority he has under this chapter (A) to obtain information from any person, and (B) to require such person to conduct such tests, keep such records, and make such reports respecting research or other activities conducted by such person as may be reasonably necessary to carry out this subsection.

(d) Useful life of vehicles

The Administrator shall prescribe regulations under which the useful life of vehicles and engines shall be determined for purposes of subsection (a)(1) of this section and section 7541 of this title. Such regulations shall provide that except where a different useful life period is specified in this subchapter useful life shall—

(1) in the case of light duty vehicles and light duty vehicle engines and light-duty trucks up to 3,750 lbs. LVW and up to 6,000 lbs. GVWR, be a period of use of five years or fifty thousand miles (or the equivalent), whichever first occurs, except that in the case of any requirement of this section which first becomes applicable after November 15, 1990, where the useful life period is not otherwise specified for such vehicles and engines, the period shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs, with testing for purposes of in-use compliance under section 7541 of this title up to (but not beyond) 7 years or 75,000 miles (or the equivalent), whichever first occurs;

(2) in the case of any other motor vehicle or motor vehicle engine (other than motorcycles or motorcycle engines), be a period of use set forth in paragraph (1) unless the Administrator determines that a period of use of greater duration or mileage is appropriate; and

(3) in the case of any motorcycle or motorcycle engine, be a period of use the Administrator shall determine.

(e) New power sources or propulsion systems

In the event of a new power source or propulsion system for new motor vehicles or new motor vehicle engines is submitted for certification pursuant to section 7525(a) of this title, the Administrator may postpone certification until he has prescribed standards for any air pollutants emitted by such vehicle or engine which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger the public health or welfare but for which standards have not been prescribed under subsection (a) of this section.

(f) [FN3] High altitude regulations

(1) The high altitude regulation in effect with respect to model year 1977 motor vehicles shall not apply to the manufacture, distribution, or sale of 1978 and later model year motor vehicles. Any future regulation affecting the sale or distribution of motor vehicles or engines manufactured before the model year 1984 in high altitude areas of the country shall take effect no earlier than model year 1981.

(2) Any such future regulation applicable to high altitude vehicles or engines shall not require a percentage of reduction in the emissions of such vehicles which is greater than the required percentage of reduction in emissions from motor vehicles as set forth in subsection (b) of this section. This percentage reduction shall be determined by comparing any proposed high altitude emission standards to high altitude emissions from vehicles manufactured during model year 1970. In no event shall regulations applicable to high altitude vehicles manufactured before the model year 1984 establish a numerical standard which is more stringent than

that applicable to vehicles certified under non-high altitude conditions.

(3) Section 7607(d) of this title shall apply to any high altitude regulation referred to in paragraph (2) and before promulgating any such regulation, the Administrator shall consider and make a finding with respect to—

(A) the economic impact upon consumers, individual high altitude dealers, and the automobile industry of any such regulation, including the economic impact which was experienced as a result of the regulation imposed during model year 1977 with respect to high altitude certification requirements;

(B) the present and future availability of emission control technology capable of meeting the applicable vehicle and engine emission requirements without reducing model availability; and

(C) the likelihood that the adoption of such a high altitude regulation will result in any significant improvement in air quality in any area to which it shall apply.

(g) Light-duty trucks up to 6,000 lbs. GVWR and light-duty vehicles; standards for model years after 1993

(1) NMHC, CO, and NOx

Effective with respect to the model year 1994 and thereafter, the regulations under subsection (a) of this section applicable to emissions of nonmethane hydrocarbons (NMHC), carbon monoxide (CO), and oxides of nitrogen (NOx) from light-duty trucks (LDTs) of up to 6,000 lbs. gross vehicle weight rating (GVWR) and light-duty vehicles (LDVs) shall contain standards which provide that emissions from a percentage of each manufacturer's sales volume of such vehicles and trucks shall comply with the levels specified in table G. The percentage shall be as specified in the implementation schedule below:

TABLE G—EMISSION STANDARDS FOR NMHC, CO, AND NO_x FROM LIGHT-DUTY TRUCKS OF UP TO 6,000 LBS. GVWR AND LIGHT—DUTY VEHICLES

Vehicle Type	Column A (5 yrs/50,000 mi)			Column B (10 yrs/100,000 mi)		
	NMHC	CO	NO_x	NMHC	CO	NO_x
LDTs (0-3,750 lbs. LVW) and light-duty vehicles.....	0.25	3.4	0.4*	0.31	4.2	0.6*
LDTs (3,751-5,750 lbs. LVW).....	0.32	4.4	0.7**	0.40	5.5	0.97

Standards are expressed in grams per mile (gpm).

For standards under column A, for purposes of certification under section 7525 of this title, the applicable useful life shall be 5 years or 50,000 miles (or the equivalent), whichever first occurs.

For standards under column B, for purposes of certification under section 7525 of this title, the applicable useful life shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs.

* In the case of diesel-fueled LDTs (0-3,750 lvw) and light-duty vehicles, before the model year 2004, in lieu of the 0.4 and 0.6 standards for NO_x, the applicable standards for NO_x shall be 1.0 gpm for a useful life of 5 years or 50,000 miles (or the equivalent), whichever first occurs, and 1.25 gpm for a useful life of 10 years or 100,000 miles (or the equivalent), whichever first occurs.

** This standard does not apply to diesel-fueled LDTs (3,751-5,750 lbs. LVW).

IMPLEMENTATION SCHEDULE FOR TABLE G STANDARDS

Model Year	Percentage*
1994.....	40
1995.....	80
After 1995.....	100

*Percentages in the table refer to a percentage of each manufacturer's sales volume.

(2) PM Standard

Effective with respect to model year 1994 and thereafter in the case of light-duty vehicles, and effective with respect to the model year 1995 and thereafter in the case of light-duty trucks (LDTs) of up to 6,000 lbs. gross vehicle weight rating (GVWR), the regulations under subsection (a) of this section applicable to emissions of particulate matter (PM) from such vehicles and trucks shall contain standards which provide that such emissions from a percentage of each manufacturer's sales volume of such vehicles and trucks shall not exceed the levels specified in the table below. The percentage shall be as specified in the Implementation Schedule below.

PM STANDARD FOR LDTS
OF UP TO 6,000 LBS. GVWR

Useful life period	Standard
5/50,000	0.80 gpm
10/100,000	0.10 gpm

The applicable useful life, for purposes of certification under section 7525 of this title and for purposes of in-use compliance under section 7541 of this title, shall be 5 years or 50,000 miles (or the equivalent), whichever first occurs, in the case of the 5/50,000 standard.

The applicable useful life, for purposes of certification under section 7525 of this title and for purposes of in-use compliance under section 7541 of this title, shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs in the case of the 10/100,000 standard.

IMPLEMENTATION SCHEDULE
FOR PM STANDARDS

Model year	Light-duty vehicles	LTDs
1994	40% *	.....
1995	80% *	40% *

1996	100% *	80% *
after 1996	100% *	100% *

*Percentages in the table refer to a percentage of each manufacturer's sales volume.

(h) Light-duty trucks of more than 6,000 lbs. GVWR; standards for model years after 1995

Effective with respect to the model year 1996 and thereafter, the regulations under subsection (a) of this section applicable to emissions of nonmethane hydrocarbons (NMHC), carbon monoxide (CO), oxides of nitrogen (NOx), and particulate matter (PM) from light-duty trucks (LDTs) of more than 6,000 lbs. gross vehicle weight rating (GVWR) shall contain standards which provide that emissions from a specified percentage of each manufacturer's sales volume of such trucks shall comply with the levels specified in table H. The specified percentage shall be 50 percent in model year 1996 and 100 percent thereafter.

TABLE H—EMISSION STANDARDS FOR
NMHC AND CO FROM GASOLINE AND
DIESEL FUELED LIGHT-DUTY TRUCKS
OF MORE THAN 6,000 LBS. GVWR

LTD Test Weight	Column A (5 yrs/50,000 mi)			Column B (10 yrs/100,000 mi)			
	NMHC	CO	NO_x	NMHC	CO	NO_x	PM
3,751-5,750 lbs. TW	0.32	4.4	0.7*	0.46	6.4	0.98	0.10
Over 5,750 lbs. TW	0.39	5.0	1.1*	0.56	7.3	1.53	0.12

Standards are expressed in grams per mile (GPM).

For standards under column A, for purposes of certification under section 7525 of this title, the applicable useful life shall be 5 years or 50,000 miles (or the equivalent) whichever first occurs.

For standards under column B, for purposes of certification under section 7525 of this title, the applicable useful life shall be 11 years or 120,000 miles (or the equivalent), whichever first occurs.

* Not applicable to diesel-fueled LDTs.

(i) Phase II study for certain light-duty vehicles and light-duty trucks

(1) The Administrator, with the participation of the Office of Technology Assessment, shall study whether or not further reductions in emissions from light-duty vehicles and light-duty trucks should be required pursuant to this subchapter. The study shall consider whether to establish with respect to model years commencing after January 1, 2003, the standards and useful life period for gasoline and diesel-fueled light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less specified in the following table:

TABLE 3—PENDING EMISSION STANDARDS FOR GASOLINE AND DIESEL FUELED LIGHT-DUTY VEHICLES AND LIGHT-DUTY TRUCKS 3,750 LBS. LVW OR LESS

Pollutant	Emission level*
NMHC	0.125 GPM
NO_x	0.2 GPM
CO	1.7 gpm

* Emission levels are expressed in grams per mile (GPM). For vehicles and engines subject to this subsection for purposes of subsection (d) of this section and any reference thereto, the useful life of such vehicles and engines shall be a period of 10 years or 100,000 miles (or the equivalent), whichever first occurs.

Such study shall also consider other standards and useful life periods which are more stringent or less stringent than those set forth in table 3 (but more stringent than those referred to in subsections (g) and (h) of this section).

(2)(A) As part of the study under paragraph (1), the Administrator shall examine the need for further reductions in emissions in order to attain or maintain the national ambient air quality standards, taking into consideration the waiver provisions of section 7543(b) of this title. As part of such study, the Administrator shall also examine—

(i) the availability of technology (including the costs thereof), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for meeting more stringent emission standards than those provided in subsections (g) and (h) of this section for model years commencing not earlier than after January 1, 2003, and not later than model year 2006, including the lead time and safety and energy impacts of meeting more stringent emission standards; and

(ii) the need for, and cost effectiveness of, obtaining further reductions in emissions from such light-duty vehicles and light-duty trucks, taking into consideration alternative means of attaining or maintaining the national primary ambient air quality standards pursuant to State implementation plans and other requirements of this chapter, including their feasibility and cost effectiveness.

(B) The Administrator shall submit a report to Congress no later than June 1, 1997, containing the results of the study under this subsection, including the results of the examination conducted under subparagraph (A). Before submittal of such report the Administrator shall provide a reasonable opportunity for public comment and shall include a summary of such comments in the report to Congress.

(3)(A) Based on the study under paragraph (1) the Administrator shall determine, by rule, within 3 calendar years after the report is submitted to Congress, but not later than December 31, 1999, whether—

(i) there is a need for further reductions in emissions as provided in paragraph (2)(A);

(ii) the technology for meeting more stringent emission standards will be available, as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for model years commencing not earlier than January 1, 2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); and

(iii) obtaining further reductions in emissions from such vehicles will be needed and cost effective, taking into

consideration alternatives as provided in paragraph (2)(A)(ii).

The rulemaking under this paragraph shall commence within 3 months after submission of the report to Congress under paragraph (2)(B).

(B) If the Administrator determines under subparagraph (A) that—

(i) there is no need for further reductions in emissions as provided in paragraph (2)(A);

(ii) the technology for meeting more stringent emission standards will not be available as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for model years commencing not earlier than January 1, 2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); or

(iii) obtaining further reductions in emissions from such vehicles will not be needed or cost effective, taking into consideration alternatives as provided in paragraph (2)(A)(ii),

the Administrator shall not promulgate more stringent standards than those in effect pursuant to subsections (g) and (h) of this section. Nothing in this paragraph shall prohibit the Administrator from exercising the Administrator's authority under subsection (a) of this section to promulgate more stringent standards for light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less at any other time thereafter in accordance with subsection (a) of this section.

(C) If the Administrator determines under subparagraph (A) that—

(i) there is a need for further reductions in emissions as provided in paragraph (2)(A);

(ii) the technology for meeting more stringent emission standards will be available, as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of

3,750 lbs. or less, for model years commencing not earlier than January 1, 2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); and

(iii) obtaining further reductions in emissions from such vehicles will be needed and cost effective, taking into consideration alternatives as provided in paragraph (2)(A)(ii),

the Administrator shall either promulgate the standards (and useful life periods) set forth in Table 3 in paragraph (1) or promulgate alternative standards (and useful life periods) which are more stringent than those referred to in subsections (g) and (h) of this section. Any such standards (or useful life periods) promulgated by the Administrator shall take effect ~~with~~ respect to any such vehicles or engines no earlier than the model year 2003 but not later than model year 2006, as determined by the Administrator in the rule.

(D) Nothing in this paragraph shall be construed by the Administrator or by a court as a presumption that any standards (or useful life period) set forth in Table 3 shall be promulgated in the rulemaking required under this paragraph. The action required of the Administrator in accordance with this paragraph shall be treated as a nondiscretionary duty for purposes of section 7604(a)(2) of this title (relating to citizen suits).

(E) Unless the Administrator determines not to promulgate more stringent standards as provided in subparagraph (B) or to postpone the effective date of standards referred to in Table 3 in paragraph (1) or to establish alternative standards as provided in subparagraph (C), effective with respect to model years commencing after January 1, 2003, the regulations under subsection (a) of this section applicable to emissions of nonmethane hydrocarbons (NMHC), oxides of nitrogen (NOx), and carbon monoxide (CO) from motor vehicles and motor vehicle engines in the classes specified in Table 3 in paragraph (1) above shall contain standards which provide that emissions may not exceed the pending emission levels specified in Table 3 in paragraph (1).

(j) Cold CO standard

(1) Phase I

Not later than 12 months after November 15, 1990, the Administrator shall promulgate regulations under subsection (a) of this section applicable to emissions of carbon monoxide from 1994 and later model year light-duty vehicles and light-duty trucks when operated at 20 degrees Fahrenheit. The regulations shall contain standards which provide that emissions of carbon monoxide from a manufacturer's vehicles when operated at 20 degrees Fahrenheit may not exceed, in the case of light-duty vehicles, 10.0 grams per mile, and in the case of light-duty trucks, a level comparable in stringency to the standard applicable to light-duty vehicles. The standards shall take effect after model year 1993 according to a phase-in schedule which requires a percentage of each manufacturer's sales volume of light-duty vehicles and light-duty trucks to comply with applicable standards after model year 1993. The percentage shall be as specified in the following table:

PHASE-IN SCHEDULE FOR COLD START STANDARDS

Model Year	Percentage
1994	40
1995	80
1996 and after	100

(2) Phase II

(A) Not later than June 1, 1997, the Administrator shall complete a study assessing the need for further reductions in emissions of carbon monoxide and the maximum reductions in such emissions achievable from model year 2001 and later model year light-duty vehicles and light-duty trucks when operated at 20 degrees Fahrenheit.

(B)(i) If as of June 1, 1997, 6 or more nonattainment areas have a carbon monoxide design value of 9.5 ppm or greater, the regulations under subsection (a)(1) of this section applicable to emissions of carbon monoxide from model year 2002 and later model year light-duty vehicles and

light-duty trucks shall contain standards which provide that emissions of carbon monoxide from such vehicles and trucks when operated at 20 degrees Fahrenheit may not exceed 3.4 grams per mile (gpm) in the case of light-duty vehicles and 4.4 grams per mile (gpm) in the case of light-duty trucks up to 6,000 GVWR and a level comparable in stringency in the case of light-duty trucks 6,000 GVWR and above.

(ii) In determining for purposes of this subparagraph whether 6 or more nonattainment areas have a carbon monoxide design value of 9.5 ppm or greater, the Administrator shall exclude the areas of Steubenville, Ohio, and Oshkosh, Wisconsin.

(3) Useful-life for phase I and phase II standards

In the case of the standards referred to in paragraphs (1) and (2), for purposes of certification under section 7525 of this title and in-use compliance under section 7541 of this title, the applicable useful life period shall be 5 years or 50,000 miles, whichever first occurs, except that the Administrator may extend such useful life period (for purposes of section 7525 of this title, or section 7541 of this title, or both) if he determines that it is feasible for vehicles and engines subject to such standards to meet such standards for a longer useful life. If the Administrator extends such useful life period, the Administrator may make an appropriate adjustment of applicable standards for such extended useful life. No such extended useful life shall extend beyond the useful life period provided in regulations under subsection (d) of this section.

(4) Heavy-duty vehicles and engines

The Administrator may also promulgate regulations under subsection (a)(1) of this section applicable to emissions of carbon monoxide from heavy-duty vehicles and engines when operated at cold temperatures.

(k) Control of evaporative emissions

The Administrator shall promulgate (and from time to time revise) regulations applicable to evaporative emissions of hydrocarbons from all gasoline-fueled motor vehicles—

(1) during operation; and

(2) over 2 or more days of nonuse;

under ozone-prone summertime conditions (as determined by regulations of the Administrator). The regulations shall take effect as expeditiously as possible and shall require the greatest degree of emission reduction achievable by means reasonably expected to be available for production during any model year to which the regulations apply, giving appropriate consideration to fuel volatility, and to cost, energy, and safety factors associated with the application of the appropriate technology. The Administrator shall commence a rulemaking under this subsection within 12 months after November 15, 1990. If final regulations are not promulgated under this subsection within 18 months after November 15, 1990, the Administrator shall submit a statement to the Congress containing an explanation of the reasons for the delay and a date certain for promulgation of such final regulations in accordance with this chapter. Such date certain shall not be later than 15 months after the expiration of such 18 month deadline.

(l) Mobile source-related air toxics

(1) Study

Not later than 18 months after November 15, 1990, the Administrator shall complete a study of the need for, and feasibility of, controlling emissions of toxic air pollutants which are unregulated under this chapter and associated with motor vehicles and motor vehicle fuels, and the need for, and feasibility of, controlling such emissions and the means and measures for such controls. The study shall focus on those categories of emissions that pose the greatest risk to human health or about which significant uncertainties remain, including emissions of benzene, formaldehyde, and 1, 3 butadiene. The proposed report shall be available for public review and comment and shall include a summary of all comments.

(2) Standards

Within 54 months after November 15, 1990, the Administrator shall, based on the study under paragraph (1),

promulgate (and from time to time revise) regulations under subsection (a)(1) of this section or section 7545(c)(1) of this title containing reasonable requirements to control hazardous air pollutants from motor vehicles and motor vehicle fuels. The regulations shall contain standards for such fuels or vehicles, or both, which the Administrator determines reflect the greatest degree of emission reduction achievable through the application of technology which will be available, taking into consideration the standards established under subsection (a) of this section, the availability and costs of the technology, and noise, energy, and safety factors, and lead time. Such regulations shall not be inconsistent with standards under subsection (a) of this section. The regulations shall, at a minimum, apply to emissions of benzene and formaldehyde.

(m) Emissions control diagnostics

(1) Regulations

Within 18 months after November 15, 1990, the Administrator shall promulgate regulations under subsection (a) of this section requiring manufacturers to install on all new light duty vehicles and light duty trucks diagnostics systems capable of—

(A) accurately identifying for the vehicle's useful life as established under this section, emission-related systems deterioration or malfunction, including, at a minimum, the catalytic converter and oxygen sensor, which could cause or result in failure of the vehicles to comply with emission standards established under this section,

(B) alerting the vehicle's owner or operator to the likely need for emission-related components or systems maintenance or repair,

(C) storing and retrieving fault codes specified by the Administrator, and

(D) providing access to stored information in a manner specified by the Administrator.

The Administrator may, in the Administrator's discretion, promulgate regulations requiring manufacturers to install

such onboard diagnostic systems on heavy-duty vehicles and engines.

(2) Effective date

The regulations required under paragraph (1) of this subsection shall take effect in model year 1994, except that the Administrator may waive the application of such regulations for model year 1994 or 1995 (or both) with respect to any class or category of motor vehicles if the Administrator determines that it would be infeasible to apply the regulations to that class or category in such model year or years, consistent with corresponding regulations or policies adopted by the California Air Resources Board for such systems.

(3) State inspection

The Administrator shall by regulation require States that have implementation plans containing motor vehicle inspection and maintenance programs to amend their plans within 2 years after promulgation of such regulations to provide for inspection of onboard diagnostics systems (as prescribed by regulations under paragraph (1) of this subsection) and for the maintenance or repair of malfunctions or system deterioration identified by or affecting such diagnostics systems. Such regulations shall not be inconsistent with the provisions for warranties promulgated under section 7541(a) and (b) of this title.

(4) Specific requirements

In promulgating regulations under this subsection, the Administrator shall require—

(A) that any connectors through which the emission control diagnostics system is accessed for inspection, diagnosis, service, or repair shall be standard and uniform on all motor vehicles and motor vehicle engines;

(B) that access to the emission control diagnostics system through such connectors shall be unrestricted and shall not require any access code or any device which is only available from a vehicle manufacturer; and

(C) that the output of the data from the emission control diagnostics system through such connectors shall be usable without the need for any unique decoding information or device.

(5) Information availability

The Administrator, by regulation, shall require (subject to the provisions of section 7542(c) of this title regarding the protection of methods or processes entitled to protection as trade secrets) manufacturers to provide promptly to any person engaged in the repairing or servicing of motor vehicles or motor vehicle engines, and the Administrator for use by any such persons, with any and all information needed to make use of the emission control diagnostics system prescribed under this subsection and such other information including instructions for making emission related diagnosis and repairs. No such information may be withheld under section 7542(c) of this title if that information is provided (directly or indirectly) by the manufacturer to franchised dealers or other persons engaged in the repair, diagnosing, or servicing of motor vehicles or motor vehicle engines. Such information shall also be available to the Administrator, subject to section 7542(c) of this title, in carrying out the Administrator's responsibilities under this section.

(f) [FN4] Model years after 1990

For model years prior to model year 1994, the regulations under subsection (a) of this section applicable to buses other than those subject to standards under section 7554 of this title shall contain a standard which provides that emissions of particulate matter (PM) from such buses may not exceed the standards set forth in the following table:

PM STANDARD FOR BUSES

Model year	Standard*
1991	0.25
1992	0.25
1993 and thereafter	0.10

* Standards are expressed in grams per brake horsepower hour (g/bhp/hr).

[1] So in original. Probably should be "(4)".

[2] So in original. Probably should be "paragraph".

[3] Another subsec. (f) (f) is set out following subsec. (m).

[4] So in original. Probably should be (n).

[CAA § 203] 42 U.S.C. § 7522. Prohibited acts

(a) Enumerated prohibitions

The following acts and the causing thereof are prohibited—

(1) in the case of a manufacturer of new motor vehicles or new motor vehicle engines for distribution in commerce, the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce, or (in the case of any person, except as provided by regulation of the Administrator), the importation into the United States, of any new motor vehicle or new motor vehicle engine, manufactured after the effective date of regulations under this part which are applicable to such vehicle or engine unless such vehicle or engine is covered by a certificate of conformity issued (and in effect) under regulations prescribed under this part or part C in the case of clean-fuel vehicles (except as provided in subsection (b) of this section);

(2)(A) for any person to fail or refuse to permit access to or copying of records or to fail to make reports or provide information required under section 7542 of this title;

(B) for any person to fail or refuse to permit entry, testing or inspection authorized under section 7525(c) of this title or section 7542 of this title;

(C) for any person to fail or refuse to perform tests, or have tests performed as required under section 7542 of this title;

(D) for any manufacturer to fail to make information available as provided by regulation under section 7521(m)(5) of this title;

(3)(A) for any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser; or

(B) for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use; or

(4) for any manufacturer of a new motor vehicle or new motor vehicle engine subject to standards prescribed under section 7521 of this title or part C of this subchapter—

(A) to sell or lease any such vehicle or engine unless such manufacturer has complied with (i) the requirements of section 7541(a) and (b) of this title with respect to such vehicle or engine, and unless a label or tag is affixed to such vehicle or engine in accordance with section 7541(c)(3) of this title, or (ii) the corresponding requirements of part C of this subchapter in the case of clean fuel vehicles unless the manufacturer has complied with the corresponding requirements of part C of this subchapter **[FN1]**

(B) to fail or refuse to comply with the requirements of section 7541(c) or (e) of this title, or the corresponding requirements of part C of this subchapter in the case of clean fuel vehicles **[FN1]**

(C) except as provided in subsection (c)(3) of section 7541 of this title and the corresponding requirements of part C of this subchapter in the case of clean fuel vehicles, to provide directly or indirectly in any communication to the ultimate purchaser or any subsequent purchaser that the coverage of any warranty under this chapter is conditioned upon use of any part, component, or system manufactured by such manufacturer or any person acting for such manufacturer or under his control, or conditioned upon service performed by any such person, or

(D) to fail or refuse to comply with the terms and conditions of the warranty under section 7541(a) or (b) of this title or the corresponding requirements of part C of this subchapter in the case of clean fuel vehicles with respect to any vehicle; or

(5) for any person to violate section 7553 of this title, 7554 of this title, or part C of this subchapter or any regulations under section 7553 of this title, 7554 of this title, or part C of this subchapter.

No action with respect to any element of design referred to in paragraph (3) (including any adjustment or alteration of such element) shall be treated as a prohibited act under such paragraph (3) if such action is in accordance with section 7549 of this title. Nothing in paragraph (3) shall be construed to require the use of manufacturer parts in maintaining or repairing any motor vehicle or motor vehicle engine. For the purposes of the preceding sentence, the term "manufacturer parts" means, with respect to a motor vehicle engine, parts produced or sold by the manufacturer of the motor vehicle or motor vehicle engine. No action with respect to any device or element of design referred to in paragraph (3) shall be treated as a prohibited act under that paragraph if (i) the action is for the purpose of repair or replacement of the device or element, or is a necessary and temporary procedure to repair or replace any other item and the device or element is replaced upon completion of the procedure, and (ii) such action thereafter results in the proper functioning of the device or element referred to in paragraph (3). No action with respect to any device or element of design referred to in paragraph (3) shall be treated as a prohibited act under that paragraph if the action is for the purpose of a conversion of a motor vehicle for use of a clean alternative fuel (as defined in this subchapter) and if such vehicle complies with the applicable standard under section 7521 of this title when operating on such fuel, and if in the case of a clean alternative fuel vehicle (as defined by rule by the Administrator), the device or element is replaced upon completion of the conversion procedure and such action

results in proper functioning of the device or element when the motor vehicle operates on conventional fuel.

(b) Exemptions; refusal to admit vehicle or engine into United States; vehicles or engines intended for export

(1) The Administrator may exempt any new motor vehicle or new motor vehicle engine, from subsection (a) of this section, upon such terms and conditions as he may find necessary for the purpose of research, investigations, studies, demonstrations, or training, or for reasons of national security.

(2) A new motor vehicle or new motor vehicle engine offered for importation or imported by any person in violation of subsection (a) of this section shall be refused admission into the United States, but the Secretary of the Treasury and the Administrator may, by joint regulation, provide for deferring final determination as to admission and authorizing the delivery of such a motor vehicle or engine offered for import to the owner or consignee thereof upon such terms and conditions (including the furnishing of a bond) as may appear to them appropriate to insure that any such motor vehicle or engine will be brought into conformity with the standards, requirements, and limitations applicable to it under this part. The Secretary of the Treasury shall, if a motor vehicle or engine is finally refused admission under this paragraph, cause disposition thereof in accordance with the customs laws unless it is exported, under regulations prescribed by such Secretary, within ninety days of the date of notice of such refusal or such additional time as may be permitted pursuant to such regulations, except that disposition in accordance with the customs laws may not be made in such manner as may result, directly or indirectly, in the sale, to the ultimate consumer, of a new motor vehicle or new motor vehicle engine that fails to comply with applicable standards of the Administrator under this part.

(3) A new motor vehicle or new motor vehicle engine intended solely for export, and so labeled or tagged on the outside of the container and on the vehicle or engine itself, shall be subject to the provisions of subsection (a) of this

section, except that if the country which is to receive such vehicle or engine has emission standards which differ from the standards prescribed under section 7521 of this title, then such vehicle or engine shall comply with the standards of such country which is to receive such vehicle or engine.

[1] So in original. Probably should be followed by a comma.

[2] So in original. Probably should be "act".

[CAA § 209] 42 U.S.C. § 7543. State standards

(a) Prohibition

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

(b) Waiver

(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—

(A) the determination of the State is arbitrary and capricious,

(B) such State does not need such State standards to meet compelling and extraordinary conditions, or

(C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

(2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).

(3) In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such

State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter.

(c) Certification of vehicle parts or engine parts

Whenever a regulation with respect to any motor vehicle part or motor vehicle engine part is in effect under section 7541(a)(2) of this title, no State or political subdivision thereof shall adopt or attempt to enforce any standard or any requirement of certification, inspection, or approval which relates to motor vehicle emissions and is applicable to the same aspect of such part. The preceding sentence shall not apply in the case of a State with respect to which a waiver is in effect under subsection (b) of this section.

(d) Control, regulation, or restrictions on registered or licensed motor vehicles

Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.

(e) Nonroad engines or vehicles

(1) Prohibition on certain State standards

No State or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions from either of the following new nonroad engines or nonroad vehicles subject to regulation under this chapter—

(A) New engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower.

(B) New locomotives or new engines used in locomotives.

Subsection (b) of this section shall not apply for purposes of this paragraph.

(2) Other nonroad engines or vehicles

(A) In the case of any nonroad vehicles or engines other than those referred to in subparagraph (A) or (B) of paragraph (1), the Administrator shall, after notice and opportunity for public hearing, authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such authorization shall be granted if the Administrator finds that—

(i) the determination of California is arbitrary and capricious,

(ii) California does not need such California standards to meet compelling and extraordinary conditions, or

(iii) California standards and accompanying enforcement procedures are not consistent with this section.

(B) Any State other than California which has plan provisions approved under part D of subchapter I of this chapter may adopt and enforce, after notice to the Administrator, for any period, standards relating to control of emissions from nonroad vehicles or engines (other than those referred to in subparagraph (A) or (B) of paragraph (1)) and take such other actions as are referred to in subparagraph (A) of this paragraph respecting such vehicles or engines if—

(i) such standards and implementation and enforcement are identical, for the period concerned, to the California standards authorized by the Administrator under subparagraph (A), and

(ii) California and such State adopt such standards at least 2 years before commencement of the period for which the standards take effect.

The Administrator shall issue regulations to implement this subsection.

[CAA § 246] 42 U.S.C. § 7586. Centrally fueled fleets

(a) Fleet program required for certain nonattainment areas

(1) SIP revision

Each State in which there is located all or part of a covered area (as defined in paragraph (2)) shall submit, within 42 months after November 15, 1990, a State implementation plan revision under section 7410 of this title and part D of subchapter I of this chapter to establish a clean-fuel vehicle program for fleets under this section.

(2) Covered areas

For purposes of this subsection, each of the following shall be a "covered area":

(A) Ozone nonattainment areas

Any ozone nonattainment area with a 1980 population of 250,000 or more classified under subpart 2 of part D of subchapter I of this chapter as Serious, Severe, or Extreme based on data for the calendar years 1987, 1988, and 1989. In determining the ozone nonattainment areas to be treated as covered areas pursuant to this subparagraph, the Administrator shall use the most recent interpretation methodology issued by the Administrator prior to November 15, 1990.

(B) Carbon monoxide nonattainment areas

Any carbon monoxide nonattainment area with a 1980 population of 250,000 or more and a carbon monoxide design value at or above 16.0 parts per million based on data for calendar years 1988 and 1989 (as calculated according to the most recent interpretation methodology issued prior to November 15, 1990, by the United States Environmental Protection Agency), excluding those carbon monoxide nonattainment areas in which mobile sources do not contribute significantly to carbon monoxide exceedances.

(3) Plan revisions for reclassified areas

In the case of ozone nonattainment areas reclassified as Serious, Severe, or Extreme under part D of subchapter I of this chapter with a 1980 population of 250,000 or more, the

State shall submit a plan revision meeting the requirements of this subsection within 1 year after reclassification. Such plan revision shall implement the requirements applicable under this subsection at the time of reclassification and thereafter, except that the Administrator may adjust for a limited period the deadlines for compliance where compliance with such deadlines would be infeasible.

(4) Consultation; consideration of factors

Each State required to submit an implementation plan revision under this subsection shall develop such revision in consultation with fleet operators, vehicle manufacturers, fuel producers and distributors, motor vehicle fuel, and other interested parties, taking into consideration operational range, specialty uses, vehicle and fuel availability, costs, safety, resale values of vehicles and equipment and other relevant factors.

(b) Phase-in of requirements

The plan revision required under this section shall contain provisions requiring that at least a specified percentage of all new covered fleet vehicles in model year 1998 and thereafter purchased by each covered fleet operator in each covered area shall be clean-fuel vehicles and shall use clean alternative fuels when operating in the covered area. For the applicable model years (MY) specified in the following table and thereafter, the specified percentage shall be as provided in the table for the vehicle types set forth in the table:

Clean Fuel Vehicle Phase-In Requirements for Fleets

Vehicle Type	MY1998	MY1999	MY2000
Light duty trucks up to 6,000 lbs. GVWR and light-duty vehicles.....	30%	50%	70%
Heavy-duty trucks above 8,500 lbs GVWR.....	50%	50%	50%

The term MY refers to model year.

(c) Accelerated standard for light-duty trucks up to 6,000 lbs. GVWR and light- duty vehicles

Notwithstanding the model years for which clean-fuel vehicle standards are applicable as provided in section 7583 of this title, for purposes of this section, light duty **[FN1]** trucks of up to 6,000 lbs. GVWR and light-duty vehicles manufactured in model years 1998 through model year 2000 shall be treated as clean-fuel vehicles only if such vehicles comply with the standards applicable under section 7583 of this title for vehicles in the same class for the model year 2001. The requirements of subsection (b) of this section shall take effect on the earlier of the following:

(1) The first model year after model year 1997 in which new light-duty trucks up to 6,000 lbs. GVWR and light-duty vehicles which comply with the model year 2001 standards under section 7583 of this title are offered for sale in California.

(2) Model year 2001.

Whenever the effective date of subsection (b) of this section is delayed pursuant to paragraph (1) of this subsection, the phase-in schedule under subsection (b) of this section shall be modified to commence with the model year referred to in paragraph (1) in lieu of model year 1998.

(d) Choice of vehicles and fuel

The plan revision under this subsection shall provide that the choice of clean- fuel vehicles and clean alternative fuels shall be made by the covered fleet operator subject to the requirements of this subsection.

(e) Availability of clean alternative fuel

The plan revision shall require fuel providers to make clean alternative fuel available to covered fleet operators at locations at which covered fleet vehicles are centrally fueled.

(f) Credits

(1) Issuance of credits

The State plan revision required under this section shall provide for the issuance by the State of appropriate credits

to a fleet operator for any of the following (or any combination thereof):

(A) The purchase of more clean-fuel vehicles than required under this section.

(B) The purchase of clean fuel **[FN2]** vehicles which meet more stringent standards established by the Administrator pursuant to paragraph (4).

(C) The purchase of vehicles in categories which are not covered by this section but which meet standards established for such vehicles under paragraph (4).

(2) Use of credits; limitations based on weight classes

(A) Use of credits

Credits under this subsection may be used by the person holding such credits to demonstrate compliance with this section or may be traded or sold for use by any other person to demonstrate compliance with other requirements applicable under this section in the same nonattainment area. Credits obtained at any time may be held or banked for use at any later time, and when so used, such credits shall maintain the same value as if used at an earlier date.

(B) Limitations based on weight classes

Credits issued with respect to the purchase of vehicles of up to 8,500 lbs. GVWR may not be used to demonstrate compliance by any person with the requirements applicable under this subsection to vehicles of more than 8,500 lbs. GVWR. Credits issued with respect to the purchase of vehicles of more than 8,500 lbs. GVWR may not be used to demonstrate compliance by any person with the requirements applicable under this subsection to vehicles weighing up to 8,500 lbs. GVWR.

(C) Weighting

Credits issued for purchase of a clean fuel **[FN2]** vehicle under this subsection shall be adjusted with appropriate weighting to reflect the level of emission reduction achieved by the vehicle.

(3) Regulations and administration

Within 12 months after November 15, 1990, the Administrator shall promulgate regulations for such credit program. The State shall administer the credit program established under this subsection.

(4) Standards for issuing credits for cleaner vehicles

Solely for purposes of issuing credits under paragraph (1)(B), the Administrator shall establish under this paragraph standards for Ultra-Low Emission Vehicles ("ULEV"s) and Zero Emissions Vehicles ("ZEV"s) which shall be more stringent than those otherwise applicable to clean-fuel vehicles under this part. The Administrator shall certify clean fuel **[FN2]** vehicles as complying with such more stringent standards, and administer and enforce such more stringent standards, in the same manner as in the case of the otherwise applicable clean-fuel vehicle standards established under this section. The standards established by the Administrator under this paragraph for vehicles under 8,500 lbs. GVWR or greater shall conform as closely as possible to standards which are established by the State of California for ULEV and ZEV vehicles in the same class. For vehicles of 8,500 lbs. GVWR or more, the Administrator shall promulgate comparable standards for purposes of this subsection.

(5) Early fleet credits

The State plan revision shall provide credits under this subsection to fleet operators that purchase vehicles certified to meet clean-fuel vehicle standards under this part during any period after approval of the plan revision and prior to the effective date of the fleet program under this section.

(g) Availability to public

At any facility owned or operated by a department, agency, or instrumentality of the United States where vehicles subject to this subsection are supplied with clean alternative fuel, such fuel shall be offered for sale to the public for use in other vehicles during reasonable business times and subject to national security concerns, unless such

fuel is commercially available for vehicles in the vicinity of such Federal facilities.

(h) Transportation control measures

The Administrator shall by rule, within 1 year after November 15, 1990, ensure that certain transportation control measures including time-of-day or day-of-week restrictions, and other similar measures that restrict vehicle usage, do not apply to any clean-fuel vehicle that meets the requirements of this section. This subsection shall apply notwithstanding subchapter I of this chapter.

CREDIT(S)

(July 14, 1955, c. 360, Title II, § 246, as added Nov. 15, 1990, Pub.L. 101- 549, Title II, § 229(a), 104 Stat. 2520.)

[FN1] So in original. Probably should be "light-duty".
[FN2] So in original. Probably should be "clean-fuel".

63 Fed. Reg. 20103 (Apr. 23, 1998)

RULES and REGULATIONS
ENVIRONMENTAL PROTECTION AGENCY
40 CFR Part 88
[FRL-5994-5]
RIN 2060-AH56
Clean Fuel Fleet Program

Thursday, April 23, 1998

AGENCY: Environmental Protection Agency.

ACTION: Direct final rule; delay of implementation date.

SUMMARY: The provisions of subpart C of Title II of the Clean Air Act require states with certain ozone and carbon monoxide (CO) nonattainment areas to revise their State Implementation Plans (SIP) to incorporate a Clean Fuel Fleet *20104 Program. Under this program, specified percentages of new vehicles acquired by covered fleet operators in certain ozone and CO nonattainment areas must meet EPA's clean-fuel vehicle (CFV) emissions standards. Today's action delays by one model year, the requirement that a covered area's State Implementation Plan implement a Clean Fuel Fleet Program (CFFP) fleet operator purchase requirement. As a result, EPA may approve a CFFP SIP revision which provides that covered fleet operators must include a certain percentage of CFVs in their fleet vehicle purchases each year beginning with model year 1999. This action is intended to ensure successful implementation of the CFFP, and to ensure that an adequate supply of appropriate vehicles is available for fleet operators to purchase and use once the program is underway, so that compliance with the mandatory purchase requirements will be possible and economically feasible for covered fleet operators.

DATES: This rule will become effective on June 8, 1998 unless the Agency receives relevant adverse comment by May 26, 1998. Should the Agency receive such comments, it will publish notification withdrawing this rule.

ADDRESSES: Interested parties may submit written comments in response to this rule (in duplicate if possible) to Public Docket No. A-97-53. It is requested that a duplicate copy may be submitted to Sally Newstead at the address in the FOR FURTHER INFORMATION CONTACT section below. The docket is located at the Air Docket, Room M-1500 (6102), Waterside Mall SW, Washington, DC 20460. The docket may be inspected between 8:00 a.m. and 5:30 p.m. on weekdays, excluding holidays. A reasonable fee may be charged for copying docket material.

FOR FURTHER INFORMATION CONTACT: Sally Newstead, Office of Mobile Sources, National Vehicle and Fuel Emissions Laboratory, 2565 Plymouth Road, Ann Arbor, Michigan 48105. Telephone (734) 668-4474.

SUPPLEMENTARY INFORMATION:

Statutory Authority

The statutory authority for this action is provided by sections 246 and 301 of the Clean Air Act.

Background

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial action and anticipates no adverse comments. However, in the proposed rules section of this Federal Register publication, EPA is publishing a separate document that will serve as the proposal for this action should relevant adverse comments be filed. This rule will be effective June 8, 1998 without further notice unless the Agency receives relevant adverse comments by May 26, 1998. If EPA receives such comments, EPA will publish a document withdrawing this final rule and informing the public that the rule did not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on the proposed rule.

The Clean Air Act, as amended in 1990 ("CAA" or "the Act"), requires certain states to adopt and submit to EPA a State Implementation Plan (SIP) containing a CFFP for nonattainment areas with 1980 populations greater than

250,000 that are classified as serious or worse for ozone, or with a design value of at least 16.0 ppm for carbon monoxide (CO). The nonattainment areas currently covered by the requirement to adopt and submit a CFFP are Atlanta, Washington DC metropolitan area, Chicago-Gary-Lake Counties, Milwaukee-Racine, Baton Rouge, and Denver-Boulder.[1]

Section 246 of the CAA provides that a states' SIP submission must require fleet operators with 10 or more vehicles that are centrally fueled or capable of being centrally fueled, to include a specified percentage of clean-fuel vehicles (CFVs) in their new vehicle purchases each year. In addition, states CFFP SIP submissions must comply with other specifications in Section 246, including the requirement that covered fleet operators must operate their CFVs in covered nonattainment areas on a clean alternative fuel, defined as a fuel on which the vehicle meets EPA's CFV standards when using such fuel. EPA promulgated emissions standards for CFVs in September 1994. See 40 CFR Part 88. EPA estimates that demand for CFVs by covered fleets in model year[2] 1998 would be approximately 47,000 light duty vehicles and 12,000 heavy duty vehicles.

Start Date for CFFP Purchase Requirement

Section 246(c) of the CAA provides that the specified percentage of new light duty vehicle purchases by covered

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[1] States with covered nonattainment areas may opt out of the CFFP with an adequate substitute program. See CAA Section 182(c)(4)(B). Eleven states have opted out of the CFFP pursuant to this provision. Areas reclassified for ozone, that have a 1980 population of at least 250,000, must also submit a SIP revision with a CFFP within one year of such reclassification. See CAA Section 246(a)(3).

[2] A "model year" for purposes of fleet operators' compliance with CFFP purchase requirements, and as used in this notice, is not the same as "model year" as defined for purposes of motor vehicle production. The definition of "model year" for the CFFP means September 1 of the preceding year through August 31 of the named year. Therefore, model year 1998 for the CFFP runs from September 1, 1997 through August 31, 1998. See 40 CFR 88.302-94.

fleet operators that must be CFVs in a given model year shall be 30% in model year 1998, 50% in model year 1999, and 70% in model year 2000 and later years, if certain categories of new vehicles (light duty trucks (LDTs) below 6000 lbs gross vehicle weight rating (GVWR) and light duty vehicles (LDVs)) certified to the Phase II CFV exhaust emissions standards are offered for sale in California.[3] In March 1993, EPA stated its expectation that the vehicles specified in Section 246(c) would be offered for sale in California by model year 1997, and therefore states' SIP submissions should provide for implementation of the CFFP purchase requirement beginning in model year 1998. EPA also stated its intent to delay this implementation date if it later determined that the requisite vehicles would not be offered for sale in California in model year 1997. See 58 FR 11888 (March 1, 1993).

EPA cannot mandate that vehicle manufacturers produce CFVs for fleets to purchase to meet the CFFP requirements—Congress intended that the creation of a market for CFVs would provide an incentive for vehicle manufacturers to produce and sell such vehicles outside California, ultimately resulting in broader market penetration. The specification in section 246 (c) that certain vehicles meeting CFV exhaust emissions standards must be available for sale in California for implementation of the CFFP purchase requirement to begin in model year 1998 was intended to provide a minimum level of reasonable assurance that complying vehicle technology was available and being produced.[4] Without some such evidence of vehicle availability, fleet operators cannot realistically be expected

[3] The Phase II CFV exhaust emissions standards are found in CAA Section 243(a)(2) and 243(b)(2), and include standards for non-methane organic gases (NMOG), CO, oxides of nitrogen (NOX), particulate matter (PM), and formaldehyde that are identical to California's Low Emission Vehicle (LEV) exhaust emissions standards.

[4] *See A Legislative History of the Clean Air Act Amendments of 1990*, Volume 1 at 903.

to comply with the CFFP purchase requirements. However, Section 246 is not clear on the issue of how many of the vehicles specified in Section 246(c) must be offered for sale in California before triggering ***20105** implementation of the CFFP purchase requirements.

In today's action, EPA is delaying the start date that the SIP must contain for implementation of the CFFP purchase requirements from model year 1998 to model year 1999, and intends to approve state SIP submissions with CFFPs that start in model year 1999. EPA has received information from various stakeholders, including states, covered fleet operators, and vehicle manufacturers on this issue, and has concluded that a delay until model year 1999 will result in a successful, effective fleet program that advances the penetration of CFVs and clean alternative fuels into the national market, and is consistent with the provisions of Section 246(c) and with Congress' intent in adopting the CFFP provisions of the Act.

The legislative history of the 1990 amendments to the CAA indicates that, in adopting the CFFP, Congress made a clear choice between two alternatives: requiring auto manufacturers to produce and sell CFVs, or creating a market for CFVs and for clean alternative fuels by requiring fleet operators to purchase such vehicles and operate on such fuels. In choosing the latter option, Congress attempted to minimize the burden on fleet operators by requiring some evidence of vehicle availability in California as a precondition to implementation of the purchase requirement before model year 2001. However, the Act does not provide a clear indication of Congressional intent regarding the number of vehicles in each weight category specified in Section 246(c) that must be offered for sale in California to trigger the fleet operators' purchase requirement. Because the CAA is silent on this particular issue, and in the absence of a clear indication of Congressional intent, it is appropriate for EPA to reasonably exercise its discretion in a way that furthers the goals of the CFFP provisions, and determine whether a sufficient number of requisite vehicle models are offered for

sale in California to require that other states SIPs implement the CFFP in MY1998.

Auto manufacturers have certified a number of vehicle models to the LEV standards in California on California reformulated gasoline, and EPA expects these vehicles could be certified as federal CFVs. However, because of the Act's requirement that fleet operators operate CFVs on clean alternative fuels, as defined in Section 241(b), fleet operators who purchase such CFVs to meet CFFP purchase requirements may have to operate these vehicles on California reformulated gasoline, which is generally not available outside California. EPA cannot conclude at this time that federal reformulated gasoline or federal conventional gasoline qualify as clean alternative fuels for CFVs certified to LEV standards on California reformulated gasoline, due to potential emissions differences resulting from differences in fuel composition between California reformulated gasoline and federal fuels. EPA expects that manufacturers could certify LEVs that have been certified to California LEV standards on California reformulated gasoline as federal CFVs on federal fuels—if manufacturers did so, fleet operators could purchase such vehicles to meet CFFP purchase requirements, and operate them on federal fuels in covered nonattainment areas without violating the fuel use requirement of the CFFP. Certain new light duty trucks (LDTs) below 6000 pounds GVWR and new light duty vehicles (LDVs) certified to LEV exhaust emissions standards are currently being offered for sale in California. However, only a limited number of LDTs below 6000 lbs. GVWR were certified to California's LEV standards and offered for sale in California in MY1997 as indicated in the following chart.

List of Certified CA LEVs Offered for Sale in California in MY97
[As of April 1997]

Manufacturer	Certification Number	Models	Type	Standard	Fuel
Ford.....	FORD-LDV-97-01-00.....	Escort, Escort Wagon.....	LDV LDV	LEV LEV	CA RFG. CA RFG.
	FORD-LDV-97-38-00.....	Sable, Sable Wagon, Taurus, Taurus Wagon.....			
General Motors.....	GM-LDT-97-29-00.....	Astro (C&P)* Passenger.....	LDT LDT	LEV LEV	CA RFG. CA RFG.
	GM-LDT-97-40-00.....	Safari AWD (P), Astro AWD (C&P)...			CA RFG.
Honda.....	HONDA-LDV-97-19-00.....	Civic, del Sol...	LDV	LEV	CA RFG.
	HONDA-LDV-97-20-00.....	Civic.....	LDV	LEV	CA RFG.
	HONDA-LDV-97-21-00.....	Civic, del Sol...	LDV	LEV	CA RFG.
	HONDA-LDV-97-22-00.....	Civic.....	LDV	LEV	CA RFG.
Nissan.....	NISSN-LDV-97-06-00.....	Sentra/200SX.	LDV	LEV	CA RFG.
Suzuki.....	SUZUK-LDV-97-05-00.....	Metro.....	LDV	LEV	CA RFG.
	SUZUK-LDV-97-06-00.....	Metro Swift....	LDV	LEV	CA RFG.
Toyota.....	TOYOT-LDV-97-11-00.....	Camry.....	LDV	LEV	CA RFG.
		Camry.....	LDV	LEV	CA RFG.

*P=Passenger, C=Cargo.

In order to meet the MY98 purchase requirements, fleet operators must have placed vehicle orders in April, 1997; however, the supply of federally certified CFVs at this time was limited. Based on the limited numbers of light duty vehicles and trucks offered for sale in California in MY1997, and particularly the limited number of LDTs <6000 pounds GVWR, EPA believes that a short delay of the required implementation date of the CFFP for one model year is reasonable to avoid the potential for serious disruption of the initial implementation of this program from an inadequate supply of vehicles. Given the list of current federally certified CFVs, the available choices for passenger cars, pick-up trucks, vans and sport utility vehicles is limited to the following: *20106

List of Certified CFVs Offered for Sale in MY97
[As of April 30, 1997]

Manufacturer	Certification Number	Models	Type	Standard	Fuel
Light Duty					
IMPCO Tech..	IMPCO-LDCNGT-97-01.....	Sierra C Pickup.....	LDT	LEV	CNG.
Chrysler.....	CHRYSLER-LDCLT-97-00.....	Caravan (2WD), Voyager (2WD).....	LDCLT	ILEV+ ULEV	CNG.
	CHRYS-ZEV-97-01	Caravan (2WD), Voyager (2WD).....	LDT	ZEV	Electricity
Ford.....	FORD-LDCNGV-97-01.....	Crown Victoria.....	LDV	ILEV+ ULEV	CNG
	FORD-LDCNGT-97-01.....	F250(2WD)....	LDT	ILEV+ ULEV	CNG
	FORD-LDCNGT-97-02.....	E250(2WD), E350(2WD)....	LDT	ILEV+ ULEV	CNG
General Motors.....	GM-ZEV-97-01.....	EV1.....	LDV	ILEV+ ZEV	Electricity
	GN-ZEV-LDT-97-01.....	S10 Pickup.....	LDT	ILEV+ ZEV	Electricity
Honda.....	HN-ZEV-97-01.....	EV Plus.....	LDV	ILEV+ ZEV	Electricity

Manufacturer	Certification Number	Models	Standard	Fuel
Cummins.....	CUMMINS-NGE (MHDD)-97-18.....	B5.9-195G.....	LEV	CNG.
	CUMMINS-NGE (MHDD)-97-19.....	B5.9-195F.....	LEV	CNG.
	CUMMINS-NGE (MHDD)-97-22.....	C8.3-250G.....	LEV	CNG.
	CUMMINS-NGE (MHDE)-97-01.....	B5.9-195G.....	ULEV	CNG.
Detroit Diesel.....	DDC-NGE (LHDDE)-97-01.....	Series 30G.....	LEV	CNG.

SIP Revisions

In light of this action, states with adopted CFFP SIPs may revise their SIPs to provide for a model year 1999 start date for the CFFP purchase requirements. Fleet operators may still earn credits for early purchase of CFVs that meet

all applicable requirements, including the requirement that fleet operators operate their CFVs on clean alternative fuels when in the covered nonattainment area. The EPA believes this action will provide states and fleet owners the necessary flexibility in those areas that are unable to meet the CFF purchase requirements cited in the CAAA.

Administrative Requirements

A. Administrative Designation

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budget impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, EPA believes that this final action is not a significant regulatory action and therefore not subject to OMB review. Approvals of SIP submittals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. This action simply revises regulations governing the requirements states' CFFP SIP submissions must meet. It serves to delay states' required implementation of CFFP

purchase requirements. Therefore, it has been determined that this action does not constitute a "major" regulation.

B. Reporting and Recordkeeping Requirement

There are no information requirements in this direct final rule which require the approval of the Office of Management and Budget under the Paperwork Reduction Act 44 U.S.C. 3501 et seq.

C. Regulatory Flexibility

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. EPA has also determined that this rule will not have significant economic impact on a substantial number of small entities. This is based on the fact that this action does not impose any new requirements, but simply delays the applicable start date of the CFFP purchase requirements that must be included in certain state's SIPs, pursuant to the CAA. Thus, the impact created by the proposed action does not increase the preexisting burden of the existing rules which this proposal seeks to amend.

D. Submission to Congress

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This rule is not a "major rule" as defined by 5 U.S.C. 804(2). ***20107**

E. Unfunded Mandates Act

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule where

the estimated costs to State, local, or tribal governments, or to the private sector, will be $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objective of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly impacted by the rule. To the extent that the rules being adopted in this action would impose any mandate at all as defined in section 101 of the Unfunded Mandates Act upon the state, local, or tribal governments, or the private sector, as explained above, this rule is not estimated to impose costs in excess of $100 million. EPA has determined that today's action simply delays the purchase requirements under state CFFPs and does not impose additional costs or regulatory burdens. In fact, the one-year delay of implementation of the purchase requirements is expected to reduce costs of compliance and ease regulatory burdens.

List of Subjects in 40 CFR Part 88

Environmental protection, Labeling, Motor vehicle pollution, Reporting and recordkeeping requirements.

Dated: April 3, 1998.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, 40 CFR part 88 is amended as follows:

PART 88—[AMENDED]

1. The authority citation for part 88 continues to read as follows:

Authority: 42 U.S.C. 7410, 7418, 7581, 7582, 7583, 7584, 7586, 7588, 7589, 7601(a).

2. Section 88.308.94 is amended by designating the existing text as paragraph (a) and by adding paragraph (b) to read as follows:

§88.308.94 Programmatic requirements for clean-fuel fleet vehicles.

* * * * *

(b) Program start date. The SIP revision shall provide that the clean fuel vehicle purchase requirements begin to apply no later than model year 1999.

[EPA letterhead]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

SEPT. 15 1999

Honorable Thomas F. Reilly
Attorney General
Commonwealth of Massachusetts
200 Portland Street
Boston, MA 02114

Dear Attorney General Reilly:

Thank you for your letter dated January 28, 1999, requesting the Agency's opinion regarding questions raised by the court in *American Automobile Manufacturers Association, et al. v. Massachusetts Department of Environmental Protection*, 163 F.3d 74 (1st Cir. 1998). EPA has reviewed this matter with particular concern for ensuring that states are provided continued flexibility in reducing emissions from automobiles and encouraging innovation in automobile design

As explained more thoroughly in the accompanying document, given the unique facts of this case and the language and intent of the Clean Air Act (the Act), EPA believes that Massachusetts's regulations requiring delivery of Zero Emission Vehicles (ZEVs) in Massachusetts from 1998-2000 are not preempted under the Act. Congress sought to ensure that other states may benefit from steps taken by California to achieve cleaner cars. First, we believe that Massachusetts's ZEV mandate is a standard subject to the identicality restrictions of the Act. That said, given the unique factual circumstances surrounding these MOAs, EPA believes that the provisions of the MOAs

requiring the placement of ZEVs in California should as well be considered standards adopted by California for purposes of section 177 and 209(a). Though the MOAs on their face are non-regulatory contractual agreements, the background for the MOAs indicate that they grew directly out of the ZEV regulatory requirements that were in place for the 1998-2002 model years prior to California removing them and were intended to stand in the place of and perform the function of these regulatory requirements, albeit with certain changes (e.g., the number of vehicles affected). Given these facts, EPA believes that state attempts to duplicate the MOAs in regulations should not be preempted by the Act.

EPA does not believe that voluntary agreements between states and manufacturers are generally preempted under section 209. EPA believes that California plays a very important role in promoting the development and sale of clean automotive technology, and that voluntary nonregulatory agreements are a valid tool to implement this role. Such agreements would not [2] normally be treated as standards for purposes of sections 209 and 177. However, under the unique factual circumstances of this case, EPA believes it is appropriate to consider these specific MOAs as standards adopted by California, which Massachusetts may then adopt under section 177.

Thank you again for your letter. If you have any questions regarding the enclosed response, please call me at (202) 260-8040.

Sincerely,

Gary S. Guzy
General Counsel

Robert Perciasepe
Assistant Administrator
Office of Air and Radiation

cc: Julie Becker, Alliance of Automobile Manufacturers

Kathleen C. Walsh, California Air Resources Board

[1] OPINION ON ISSUES RAISED BY AAMA v. MASSACHUSETTS DEP

By letter dated January 28, 1999, Mr. Thomas F. Reilly, the Attorney General of Massachusetts, requested the Agency's opinion regarding questions raised by the U.S. Court of Appeals for the First Circuit in the case *American Automobile Manufacturers Assn v. Massachusetts Dept of Environmental Protection*, 163 F.3d 74 (1st Cir. 1998). That case involves a challenge by automobile manufacturers to Massachusetts's zero emission vehicle (ZEV) production requirement for calendar years 1998-2000. Massachusetts's ZEV mandate for model year 2003 and beyond is not at issue. The Court's opinion, dated December 29, 1998, specifically directed Massachusetts to seek the Agency's opinion on these questions. The Court stayed proceedings in the case for 180 days to allow time for the Agency to provide its opinion. On July 7, 1999, the court, pursuant to a request from EPA, stayed further proceedings until September 15, 1999. If EPA does not issue any opinion by that date, the Court said it would decide the issues without EPA guidance.

The letter requests EPA's opinion regarding whether Massachusetts's ZEV production requirement is preempted under the Clean Air Act. The ZEV requirement mandates that the seven largest automobile manufacturers produce for sale specific numbers of ZEVs in the 1998-2000 calendar years. The Court ruled that EPA has primary jurisdiction over the issues,[5] which arise under sections 209 and 177 of the Clean Air Act. The Court also indicated that it expected to give deference to EPA's view on these issues.

EPA believes that, given the text and the underlying goals of the statute and in light of the unique facts of the

[5] Primary jurisdiction is "a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." *Id.* at 81, quoting *Reiter v Cooper*, 507 U.S. 258, 268 113 S. Ct. 1213 (1993).

case, Massachusetts's ZEV requirement should not be preempted. EPA believes that this interpretation ensures that, under similar circumstances, states will be able to implement the emission control standards in effect in California, as contemplated by section 177 of the Act.

I. Background

A. Statutory Provisions

The Clean Air Act generally prevents states from enacting their own emission control programs for new motor vehicles. Section 209(a) of the Clean Air Act (CAA or the Act), 42 U.S.C. § 7543(a), prohibits states from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles..." Also, "[n]o State shall require certification, inspection, or any approval related to the control of emissions from any new motor [2] vehicle ... as conditions precedent to the initial sale, titling ... or registration of such motor vehicle..."

There are, however, two exceptions to this general rule. First, when Congress enacted the section 209(a) prohibition in 1967, it recognized that California has special air quality needs justifying a new motor vehicle emission control program more stringent than the federal program, and that California has been the trailblazer in requiring stringent emission controls for motor vehicles. S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967). Therefore, Congress at the same time enacted section 209(b), which allows California, pursuant to a waiver granted by EPA, to enact its own motor vehicle program, as long as it is at least as stringent, in the aggregate, as the federal program and is technologically feasible given leadtime and cost.

Second, in 1977, Congress enacted CAA section 177, 42 U.S.C. § 7507, which allows other states to enact regulations controlling emissions from new motor vehicles, but only if the state standards are identical to California's standards controlling motor vehicle emissions. This provision allows other states to control emissions from new motor vehicles without requiring motor vehicle manufacturers to comply with a patchwork of different state standards. See *Motor*

Vehicle Manufacturers Ass'n v. New York; 17 F. 3d 521, 527-28 (2nd Cir. 1994). Under section 177, as amended in 1990:

> Notwithstanding section 209(a), any State which has plan provisions approved under this part may adopt and enforce for any model year standards relating to control of emissions from new motor vehicles . . . if
>
> (1) such standards are identical to the California standards for which a waiver has been granted for such model year, and
>
> (2) California and such State adopt such standards at least two years before commencement of such model year .... Nothing in this section or in title II of this Act shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle . . . that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle . . . different than a motor vehicle . . . certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle."

B. Regulatory Background

In 1990, California adopted regulations establishing a Low Emission Vehicle (LEV) program, which requires automobile manufacturers ("manufacturers") to meet progressively more stringent automobile standards beginning in model year 1994. The LEV program provides that manufacturers must build vehicles that meet one of several sets of standards (i.e. "Tier 1 vehicles," Transitional Low Emission Vehicles (TLEVs), Low Emission Vehicles (LEVs), Ultra Low Emission Vehicles (ULEVs) and Zero Emission Vehicles (ZEVs)) and that manufacturers' fleets for each model year must meet a fleetwide non-methane organic gases (NMOG) emission [3] average, which becomes progressively more stringent each year. The LEV program also initially included a provision requiring that, beginning in model year 1998, two percent of all automobiles offered for sale by manufacturers in any model year must be ZEVs. This percentage increased to five percent in model year 2001

and to ten percent in model year 2003. The only vehicles that can meet this requirement using current technology are electric vehicles. In January, 1993, EPA granted California's request for a waiver of preemption under CAA section 209(b) for its LEV program, including the ZEV provisions,

Following California's adoption of its LEV program, New York and Massachusetts adopted state motor vehicle requirements that mirrored the California LEV program, including the ZEV provisions, under CAA section 177. Manufacturers sought judicial review of the New York and Massachusetts requirements, claiming the regulations were preempted under the Clean Air Act. Manufacturers argued, among other things, that the states' adoption of California's ZEV mandate violated: 1) section 177's requirement that state regulations not limit the sale of California vehicles; and 2) section 177's "third vehicle prohibition." In both cases, the courts found that the state programs were not preempted. *American Automobile Manufacturers Assn v. Greenbaum*, No. 93-10799-MA (D. Mass. Oct. 27, 1993),[6] *aff'd* 31 F. 2d 18 (1 st Cir. 1994); *Motor Vehicle Manufacturers Assn v. New York*, 17 F. 3d 521 (2nd Cir. 1994); *Motor Vehicle Manufacturers Assn v. New York*, 79 F. 3d 1298 (2nd Cir. 1996). The Court in the New York case dealt specifically with the manufacturers' claims against New York's ZEV mandate, and found that the New York's ZEV production requirement did not violate the "sales limitation" or "third vehicle" prohibitions of section 177 because New York's ZEV requirement was identical to California's ZEV requirement. *Motor Vehicle Manufacturers Assn v New York*, 17 F. 3d at 536-538. EPA filed amicus briefs defending the New York and Massachusetts programs in these cases.

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[6] The court in the Massachusetts case did not make a final ruling, but denied manufacturers' motion for a preliminary injunction on Counts 1 through 4 of their complaint, which are not directly related to manufacturers' issues regarding the ZEV mandate, based on the "strong showing on the merits" by Massachusetts. *Id*, slip slip op. At 26.

However, in 1997, California deleted the ZEV sales requirement from its regulations for all model years prior to 2003. At approximately the same time, California signed seven Memoranda of Agreement (MOAs) with the largest manufacturers: In the MOAs, the manufacturers agreed to a demonstration program under which manufacturers would place in California substantially fewer numbers of ZEVs from calendar years 1998 to 2000 than were required under the initial regulations. The manufacturers agreed to place a combined total of 750 ZEVs in California in 1998 and a combined total of 1500 ZEVs in California in both 1999 and 2000. No ZEVs were required in calendar years 2001 and 2002. California agreed in the MOAs to provide a certain amount of infrastructure and support to facilitate the use of ZEVs. Manufacturers also agreed to provide LEVs nationwide under the National Low Emission Vehicle (NLEV) program. Manufacturers are subject to potentially severe penalties, through liquidated damages, if they fail to comply with the MOA. For example, a complete failure to implement the [4] MOA could lead to a penalty equal to a manufacturer's pro-rata share of $100,000,000.[7] The determination of whether a breach has occurred is determined initially by the Executive Officer for California's Air Resources Board (CARE), with *de novo* review by the Board, and then *de novo* review in state court. There are no similar provisions for a breach by California. These MOAs were not codified into California's regulations and were not submitted to EPA for a waiver.

Following California's deletion of its ZEV mandate between 1998 and 2002, Massachusetts revised its own ZEV requirements for those years to require that manufacturers deliver in Massachusetts the number of ZEVs each manufacturer agreed to "place" in California under the seven MOAs. Massachusetts also enacted certain reporting

[7] Each manufacturer's pro-rata share, based on historical share of the California market, is defined in the MOAs.

requirements related to placement of ZEVs in Massachusetts.[8]

C. Litigation

AAMA sued Massachusetts in the Federal District Court in Massachusetts, claiming that Massachusetts's ZEV requirement is an emission standard prohibited by CAA section 209(a) and is not permitted by CAA section 177. AAMA claims that the California MOAs are not "standards" as that term is used in sections 177 and 209 of the CAA, but rather contractual agreements. AAMA claims that since Massachusetts's ZEV production requirement is a state standard prohibited under section 209(a) and since it is not identical to any California standard, it is not authorized by, section 177. AAMA also claims that even if the MOAs are standards, California has never asked for or received a waiver for them, so Massachusetts's ZEV mandate is not identical to any California standard for which a waiver had been granted. Finally, AAMA claims that the Massachusetts sales requirement is not identical to the MOAs because it did not contain the reciprocal obligations that California had obliged itself to meet under the MOAs, and Massachusetts had not changed the sales requirements in the MOAs to take account of the smaller number of vehicles sold in Massachusetts compared to California.

Massachusetts claims that its ZEV mandate is not preempted because it is not a "standard" under section 177 but is instead an "enforcement mechanism" related to the LEV standards, which, Massachusetts claims, need not be identical to California standards under section 177. Alternately, Massachusetts claims that if a ZEV mandate is

[8] New York, on the other hand, did not revise its ZEV mandate, continuing to require two percent of manufacturers' vehicles to be ZEVs in the 1998-2000 model years. Manufacturers brought a new challenge to New York's ZEV requirement based on the fact that it was no longer identical to California's requirement and therefore violated section 177. The Second Circuit found that the New York ZEV mandate was preempted. *American Automobile Manufacturers Ass'n v. Cahill*, 152 F. 3d 196 (2nd Cir. 1998) ("Cahill").

a standard, it is a standard whether it is in regulations, as in Massachusetts, or in MOAs, as in California. Thus, California's ZEV [5] requirements would also be standards and Massachusetts's ZEV regulations would be identical to them. Massachusetts claims that its failure to incorporate California's obligations do not render its standards non-identical because the automobile manufacturers' obligations under the MOAs are not dependent on California's obligations. Moreover, Massachusetts claims that California does not need to receive a separate waiver from EPA for the MOAs because they are within the scope of the previous waiver granted to California for its LEV program.

1. The Decision of the District Court

The District Court found that Massachusetts's ZEV mandate was preempted by the CAA, because it "does not adopt a standard identical to California law, or enforce such a standard." *American Automobile Manufacturers Ass'n v. Massachusetts Dept of Environmental Protection*, 998 F. Supp. 10, 18 (D. Mass. 1997) ("*AAMA I*"). The Court found that California's MOAs were not standards because they were voluntary agreements. The Court stated that Massachusetts's mandate violates the "identicality" provision because it "adopts or enforces" a standard in *1998 (i.e.* the production of ZEVs) that California does not require until 2003. Though the Court did not specifically decide whether the ZEV mandate is itself a standard, the court found that the Massachusetts ZEV mandate was preempted. Massachusetts appealed.

2. The Decision of the Court of Appeals

The Court of Appeals for the First Circuit found that many of the issues raised by the case, including the issue of whether the ZEV mandate and the MOAs are "standards," are within EPA's primary jurisdiction and would benefit from EPA's "deep familiarity with the CAA and the public policy considerations that underlie these statutory provisions." *American Automobile Manufacturers Ass'n v. Massachusetts Dept of Environmental Protection*, 163 F.3 d 74, 83 (1st Cir. *1998) ("AAMA II").*

The court further determined that the statutory interpretations of these provisions "lend themselves to competing interpretations . . . and that both are sufficiently reasonable that we would be bound by *Chevron* to defer to the EPA's choice of either one." *Id.*, at *83.*

The court gave Massachusetts 180 days to obtain a ruling from the EPA on these issues, providing a deadline of June 27, 1999. The court said it would decide the issues without EPA's guidance if EPA did not provide its opinion by that date.[9]

D. Administrative Proceedings

On March 26, 1999, EPA published a notice in the Federal Register requesting comment from the public on the letter from the Massachusetts Attorney General. The period for comment [6] ended on April 26, 1999. EPA received detailed comments from Massachusetts and New York supporting Massachusetts's ZEV requirements and detailed comments from California and the Alliance of Automobile Manufacturers/Association of International Automobile Manufacturers against the ZEV requirements. EPA also received several more summary comments from other parties either supporting Massachusetts or the automobile manufacturers.

On June 24, 1999, in a letter from Robert Perciasepe, Assistant Administrator for Air and Radiation to Attorney General Thomas F. Reilly, EPA notified Massachusetts that it was having difficulty meeting the deadline of June 27, 1999 set by the court and anticipated issuing its response by early September. EPA requested that Massachusetts inform the court and inquire whether answering the court's questions in this time frame is acceptable. Massachusetts provided this letter to the court. On July 7, 1999, the court granted the request for additional time, providing EPA until September 15, 1999 to respond to the court's questions.

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[9] As earlier noted, pursuant to EPA request, the court has now extended the deadline to September 15, 1999.

II. Analysis

There is a two-step analysis to determine whether the Massachusetts ZEV mandate is preempted by the Clean Air Act. The first issue is whether the regulation is, as a preliminary matter, prohibited under section 209(a) of the Act. If the regulation would be so prohibited, the next issue is whether the provisions of section 177 nonetheless permit the regulation. With regard to Massachusetts's ZEV mandate, the court answered the first issue and therefore did not refer it to EPA. Thus this document focuses principally on the second issue.

A. Does Section 209(a) Preempt the Massachusetts ZEV Mandate?

The First Circuit ruled that whether the ZEV sales requirement is a standard or an enforcement procedure, it is preempted by section 209(a). This is based on the clear language of section 209(a), which forbids states from "adopt[ing] or attempt[ing] to enforce any standard." Thus, whether the ZEV mandate is itself a standard, as manufacturers claim, or is merely a mechanism for enforcing the other LEV standards, as Massachusetts claims, it is subject to the preemption provisions of section 209(a). *AAMA II* at 83. EPA agrees with the court's reasoning on this issue.

B. Does Section 177 Override Section 209's Preemption as to the Massachusetts ZEV Mandate?

State measures that would otherwise be preempted under section 209 are nevertheless permitted under section 177 if state standards for a particular model year are identical to "California standards for which a waiver has been granted for such model year" and if the standards were adopted at least two years before the model year begins. However, state regulations cannot "limit . . . the manufacture or sale of a new motor vehicle ... that is certified in California" or "have the effect of creating, a motor vehicle ... different than a motor vehicle ... certified in California under California standards (a 'third vehicle') or

otherwise create such a [7] third vehicle." For purposes of this analysis, the key issue regarding Massachusetts's ZEV mandate is whether the mandate is subject to the "identicality" criterion and, if so, whether it meets that criterion.[10]

1. Is the ZEV mandate subject to the identicality provision?

The first question is whether Massachusetts's mandate is subject to the identicality requirements of section 177. Massachusetts argues that the ZEV mandate is not subject to the identicality requirement because the identicality requirement applies only to standards and the ZEV mandate is not a standard, but an enforcement procedure. The manufacturers, on the other hand, argue that the ZEV mandate is a standard, and thus is covered by the identicality requirement. They also argue that the identicality requirement applies in any case to enforcement procedures, but they claim in their comments that EPA need not resolve that issue in this proceeding.

Is the Massachusetts ZEV Mandate a Standard?

i. Comments

Massachusetts argues in its comments that the ZEV mandate is not a standard relating to the control of emissions from new motor vehicles. It claims that the ZEV mandate has only a negligible impact on emissions. The purpose of the mandate is not to reduce emissions directly, but to create the conditions necessary for the implementation of the ZEV mandate in 2003. Massachusetts also states that the ZEV mandate is not a "quantitative standard" and should not be considered an emissions standard, citing *Adamo Wrecking Co. v. US.*, 434 U.S. 275, 285-89 (1978).[11] Massachusetts's comments are echoed by

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[10] The other issues were not raised in the litigation.

[11] The court in that case found that the term "emission standard" under section 112 of the Clean Air Act, as in effect prior to 1977, was

New York. New York claims that the ZEV mandate does not rise to the level of a standard but instead helps enforce compliance with the other standards in the LEV program. New York cites *Motor and Equipment Manufacturers Association v. EPA*, 627 F. 2d 1095 (D.C. Cir. 1979) ("MEMA"). In that case, the D.C. Circuit describes standards as regulations involving "quantitative levels of emissions" and measures that directly address air quality. *Id.*, at 1112-1113. New York claims that the ZEV requirement does not directly address air quality.

Automobile manufacturers argue that the ZEV mandate is a standard. They note that the 2nd Circuit has already found New York's ZEV mandate to be a standard. Further, they claim that the MEMA decision supports their argument because the ZEV mandate does affect emissions, in that it reduces levels of nitrogen oxides (NOx), carbon monoxide (CO), and evaporative [8] hydrocarbons (HCs). The manufacturers state that EPA has previously recognized that the ZEV mandate imposes direct air quality controls that are separate and distinct from the NMOG fleet average. 59 Fed. Reg. at 48,592 (Sept. 22, 1994) (Supplemental Notice of Proposed Rulemaking, Ozone Transport Commission LEV Program).

The manufacturers argue that the most simple standard requires 100% compliance, but a standard is no less a standard merely because it requires only a portion of the fleet to comply. They note that section 202(g) of the Act clearly states that the Tier I "standards" include both the emission levels and the phase-in associated with those levels.

Further, the manufacturers claim that as a practical matter, if state sales requirements need not be identical to California sales requirements, EPA will be giving other states more power than California, because they could then freely decide the number of clean vehicles sold in the state without having to get any approval from EPA regarding

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distinguishable from "design, equipment, work practice or operational standard(s)." *Id.*

stringency or consistency with section 202(a), which are criteria that California must meet under section 209(b). According to the manufacturers, this is contrary to the intent of Congress in enacting section 177, which was to allow states to get needed emission reductions while not causing undue burden on manufacturers, which would occur if each state were allowed to pick its own production requirements. Manufacturers claim that allowing states to adopt their own ZEV mandates could create the "anarchic patchwork" that concerned Congress and the court in *MEMA. Id.*, at 1109.

On this issue, the state of California provided comments similar to those of the manufacturers.

ii. Analysis

EPA believes that the most appropriate interpretation of the language and policy goals of the statute is that Massachusetts's ZEV mandate is a standard for purposes of sections 171 and 209.

The language of the Act contemplates that a standard, for the purposes of sections 177 and 209, would include the requirement to produce a certain number or percentage of vehicles ("production requirement") to meet a numerical emissions limitation. The Clean Air Act does not define the term "standard relating to the control of emissions from new motor vehicles," as found in sections 177 and 209. However, in CAA section 202, which provides EPA's authority for promulgating standards applicable to emissions from motor vehicles, the terms "standard" clearly encompasses both a numerical emission limitation and the number of vehicles that are subject to that limitation. For example, section 202(g), 42 U.S.C. § 7521(g), specifically requires EPA to promulgate "standards" that "provide that emissions from a percentage of each manufacturer's sales volume ... shall comply with the levels specified." Similarly, many current EPA motor vehicle regulations contain phase-in requirements or fleet averages, which EPA has promulgated

[9] under its authority to issue standards under CAA section 202.[12] Part and parcel of the standard-setting authority is the authority to specify the number of vehicles produced by a manufacturer that are subject to particular emission limits. The flexibility to promulgate phase-ins, fleet standards, or a particular "mix" of standards in a particular year is an important aspect of EPA's standard-setting authority. There is little reason to believe that Congress intended a substantially different interpretation of "standard" under section 209 than that under section 202.

A numerical emission limit, by itself has no real meaning absent a tie to the kind and number of motor vehicles to which the limit applies. Setting the link between the emission limit and the applicability of the limit to a particular number of vehicles is an inherent part of the standard setting process. This process specifies the level of emissions or emissions reductions that is expected from a manufacturer and establishes the amount of emissions reductions expected from the standard setting process. If a production requirement, such as the ZEV mandate, is not considered part of the standard itself, then compliance with a standard (i.e., the numerical emission limitation) would be disconnected from the obligation to build cars to meet the standard This could lead to emission standards that have no air quality benefit at all.

This combination of an emissions limit and a requirement to produce vehicles meeting that limit is key to

[12] Percentage production requirements are similar to fleet average emission standards. Such fleetwide standards can easily be converted into percentage requirements, and vice versa. For example, regulations that require 40% of vehicles to meet a 1 gram standard and the rest to meet a 2 gram standard could easily be rewritten as a fleetwide average of 1.6 grams, with two sets of certification standards. EPA has already found that fleetwide average emission standards are "standards." See 62 Fed Reg. 31192, 31222 (June 6, 1997) ("the Agency may promulgate standards, such as fleet averages [and] phase-ins, that are fulfilled through compliance over an entire fleet, or a portion thereof, rather than through compliance by individual vehicles.")

evaluating certain central issues in standard setting. For example, consideration of cost, availability of technology, and resulting emissions reductions all require that both the numerical limit and the applicability of the limit be considered. EPA's obligation to consider these factors in setting emissions standards, and in considering California's requests for waivers from preemption under section 209(b), indicates that the requirement to produce vehicles is in fact part of the emission standard. See sections 202(a), 209(b), 213(a)(3), (4) and (5). For example, under section 209(b), EPA must determine whether California is arbitrary in its determination that its standards are "in the aggregate, at least as protective of public health and welfare as applicable Federal standards." It would be difficult for EPA to make such a determination if it did not review the obligation of manufacturers to build their vehicles, or a portion of their vehicles, to meet California's standards.

Enforcement provisions, by contrast, are designed not to provide a certain level of emission reductions directly, but instead to ensure that the level of emissions reductions expected from the standards actually occur. See *Cahill*, 152 F. 3d at 200. If all requirements considered to be enforcement measures were deleted, and the manufacturers still complied with the [10] requirements considered to be standards, emissions would still be reduced to the levels expected when the standard was set. Since production requirements directly affect the emission reductions from a regulation, rather than ensuring that such reductions occur, they should be seen as an inherent part of motor vehicle emission standards, not enforcement provisions.

The policies underlying section 177 also indicate that the ZEV mandate should be considered a standard, because if production requirements are not standards, then other states could enact production requirements that were different from California's requirements substantially undercutting Congress's intent under section 177 to prevent manufacturers from being required to build different vehicles for various state programs. Section 177 was enacted to allow states to require emission reductions from

new motor vehicles without causing vehicle manufacturers the undue burden of having to meet different standards in different states.[13] California was to be the model for all other states to follow. EPA could be assured that state regulations were technologically feasible and at least as stringent as federal regulations because EPA would have already found California's regulations to meet those requirements under section 209(b).

However, if other states are not limited to the production mandates in California's regulations, this attachment to California's program would be diminished. California would no longer be the model for state programs. Further, EPA's evaluation of California's program under section 209(b) might no longer be relevant for programs enacted by other states. Since such states are not subject to EPA review under section 177 or 209, states would be free to create their own programs without any oversight from EPA. Such states would therefore have substantially more freedom than even California to design their own motor vehicle programs. Manufacturers could be forced to build different numbers or percentages of vehicles to meet the requirements of different states. For example, a state could turn a relatively slow phase-in of a new standard under California's requirements into an immediate requirement for 100% compliance. Because EPA's review of California's motor vehicle program under section 209(b) presumed California's slow phase-in, the other state's revised program with an immediate 100% requirement would have escaped all EPA review, which may lead to the enactment of an infeasible requirement in the other state.

Massachusetts's argument regarding the negligible emissions impact of the ZEV mandate is unpersuasive. The

[13] See, e.g., 123 Cong. Rec. 17,765, 17,766 (June 7, 1977) (Statement of Sen. Anderson regarding section later adopted) ("The language in my amendment... would allow only the present two-car strategy to extend to other States.... No additional certification of different kinds of cars will be required and no new standards will be created.")

small effect on emissions is related only to the number of ZEVs being required not to the issue of whether the mandate is a standard. If a mandate requiring production of a small number of ZEVs is not a standard, it is difficult to see why a mandate for a larger number would be a standard. They are the same type of regulation. In any case, the ZEV mandate would clearly have an impact, however small, on emissions. In particular, emissions [11] from those vehicles specifically subject to the mandate would be substantially affected by the mandate.

In fact, Massachusetts's argument would allow a state to impose the burden on industry that section 177 seeks to avoid, while achieving little or none of the emissions benefits contemplated by section 177. Massachusetts's ZEV mandate requires ZEVs to be delivered for sale in Massachusetts. But for that mandate, manufacturers would not have to produce any ZEV; for sale in Massachusetts from 1998-2000. If the Massachusetts ZEV requirement is different from California's requirement, manufacturers would indeed be subject to different production requirements in different states. This could impose the kind of burden on industry that section 177 was designed to prevent. However, Massachusetts claims that the negligible emissions benefits of the mandate should excuse Massachusetts from the identicality requirement. Yet the purpose of section 177 is to allow states other than California to obtain needed emission reductions from vehicles.

Finding that the Massachusetts ZEV mandate is a standard is also consistent with the view of the Second Circuit, which reviewed virtually the same issue in *Cahill*. In that case, the court ruled that New York's ZEV mandate was an emission standard. The court ruled that standards are "regulatory measures intended to lower the level of auto emissions, while 'enforcement mechanisms' describe regulatory devices intended to ensure standards are effective. ... [T]he ZEV sales requirement must be considered a standard `relating to the control of emissions.' ZEV, after all, stands for 'zero-emission vehicle,' and a requirement that a particular percentage of vehicle sales be

ZEVs has no purpose other than to effect a general reduction in emissions." *Id.* at 200.[14]

EPA therefore believes that the Massachusetts ZEV mandate is a standard for purposes of sections 177 and 209 and is subject to the "identicality provision" in section 177.[15]

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[14] The two cases cited by Massachusetts and New York are not helpfulto them. The *MEMA* case concerned an in-use compliance provision that clearly was an enforcement treasure. The opinion contains dicta that are helpful to either argument. Even assuming the *Adamo* case was ever relevant to the determination of standard under Title II (as the *MEMA* court suggests, 627 F.2d at 1112 n.35, the word "standard" as used in Title 11 is distinguishable from its use in the rest of the Act), it is no longer because Congress has legislatively overruled *Adamo* twice, increasing the scope of the term "emission standard" under section 112, and the rest of the Act, to include the work practice requirements disallowed in *Adamo*. Compare section 302(k), 42 U.S.C. §7602(k) as revised in 1990, to the same section prior to 1990. See also CAA section 112(e)(5), 42 U.S.C. § 7412(e)(5), as in effect prior to 1990, which was enacted in 1979 as a direct response to *Adamo*, 92 Stat. 3443, 3457.

[15] The manufacturers also argue that even if the ZEV mandate is not a standard, regulations other than standards are subject to the identicality requirement under section 177. This issue is relevant not only for evaluation of the ZEV production mandate, but for evaluation of Massachusetts's ZEV reporting requirements. In the context of EPA's conclusion with regard to the proper scope of "standards" under sections 177 and 209, EPA disagrees with manufacturers' argument that requirements other than standards are subject to the identicality requirement. In enacting sections 209 and 177, Congress was careful in its use of the terms "standards" and "accompanying enforcement procedures." See *MEMA*, 627 F. 2d at 1113. Within section 209, subsections (a), (b)(1)(C) and (e)(2)(B) all specifically differentiate between standards and other types of requirements, which would be unnecessary if standards were meant to include other types of requirements. It is clear that Congress understood the difference between these terms when it promulgated provision applies on its face only to standards is strong evidence that requirements other than standards are not covered by that requirement. The Second Circuit reached this conclusion in *Motor Vehicle Manufacturers Ass'n v. New York*; 79 F. 3d 1298, 1305-06 (2nd Cir. 1996). The history of section 177 also supports this analysis. In 1990, Congress revised section 177 to prevent states from taking any action to create a "third vehicle." As the Second Circuit recognized in *Motor Vehicle Manufacturers Assn v New York*, 17 F. 3d 521, 537 (2nd Cir. 1994), a clear purpose of this "third vehicle" prohibition was to prevent states from administering and enforcing standards in such a manner as to effectively require a third vehicle. If the identicality requirement applied to enforcement procedures, the "third vehicle prohibition" would be unnecessary, as identical enforcement procedures could never create a third vehicle. Moreover, the legislative history of this 1990 amendment makes clear that Congress intended states to retain their ability to enforce California's standards through regulations that need not meet the identicality requirements of section 177. Statement of Sen. Baucus, 136 Cong. Rec. S16976 (Oct. 27, 1990) (noting that Congress reaffirmed the pre-existing EPA position that state enforcement procedures need not be identical to California's). Moreover, as noted by the Second Circuit, "it is understandable that Congress did not limit states in this way -- enforcement techniques will necessarily vary from state to state." *Motor Vehicle Manufacturers Assn v. New York*, 79 F. 3d at 1306.

[12]

2. Is the ZEV mandate identical to a California standard that has received a waiver for the same model years?

(a) Are California's MOAs standards under sections 209 and 177?

i. Comments

Massachusetts argues that California's MOAs are regulations in all but name, and thus are standards under section 209(a) regardless of form. According to Massachusetts, the term "standards" can mean regulatory standards or contractual standards. Massachusetts states that the MOAs are one-sided and manufacturers pay a heavy penalty (enforceable liquidated damages) for failure to deliver, which indicates their similarity to regulatory standards. Massachusetts claims that the MOAs are an attempt by auto manufacturers to avoid regulation by states other than California. Massachusetts claims that allowing this type of contractual arrangement would [13] give California unreviewable discretion to decide the scope of other states' programs and urges EPA to close the door on this device to prevent attacks on section 177.

New York echoes Massachusetts's arguments, saying that the MOAs undercut Congress's framework under

section 177 and saying that California has grossly abused its powers.

California and the automobile manufacturers argue that the MOAs are not standards and should not be subject to preemption under section 209. They argue that Clean Air Act section 302(k) defines an emission standard as a "requirement established" by EPA or a state, thus implying unilateral regulatory action, not contractual action. Section 209 speaks of "adopting" a standard, which also implies regulatory action, not contractual action.

California and the manufacturers note that the MOAs are contracts and were not adopted by regulation. They argue that federal preemption of state action generally, and the provisions of section 209 in particular, apply only to regulations, and do not preempt a state's ability to contract. See *Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts*, 507 U.S. 218, 226-27 (1993) and *American Airlines Inc. v. Wolens*, 513 U.S. 219, 229 (1995). These commenters claim that the case cited by the 1st Circuit, *Wisconsin Dep't of Industry v. Gould*, 475 U.S. 282 (1986) is not on point because the Supreme Court in that case invalidated a state statute, not a contract.

California and the manufacturers further argue that Congress never contemplated that a voluntary agreement between California and a manufacturer could be transformed into a binding commitment unilaterally imposed by another state. Section 209(a) was, they argue, designed to protect manufacturers from being forced into a patchwork of regulations, not to prevent voluntary actions. California and other states have previously entered into settlement agreements and other voluntary agreements similar to the MOAs. According to California and the manufacturers, a decision that California's MOAs are covered by section 209 would preempt such voluntary agreements by all states.

California notes that EPA is not precluded from reviewing California's MOAs under the criteria of section 209(b) if the existence of the MOAs calls California's

[illegible]tiveness finding into question. California also notes that Congress specifically gave it extra powers because of its unique air quality problems and its trailblazing in the automobile emission control arena. California claims that the spurring of technological development is one of its most important functions in the Congressional scheme and will ultimately help the whole country. According to California, the MOAs, which create demonstration programs for advanced technology ZEVs, are consistent with Congress's intent. The limited MOAs are, in California's view, the best way to introduce these ZEVs. The automobile manufacturers claim that they need to focus their development efforts on California projects without having to meet widespread requirements in other states before they are ready for commercial distribution. **[14]**

ii. Analysis

Given the unique factual circumstances surrounding these MOAs, EPA believes that the provisions of the MOAs requiring the placement of ZEVs in California should be considered standards adopted by California for purposes of section 177 and 209(a). Though the MOAs on their face are non-regulatory contractual agreements, the background for the MOAs indicate that they grew directly out of the ZEV regulatory requirements that were in place for the 1998-2002 model years prior to California removing them and were intended to stand, in the place of and perform the function of these regulatory requirements, albeit with certain changes (e.g., the number of vehicles affected). Moreover, it appears from the record that the MOAs were developed as contractual agreements, rather than regulatory standards, with an intention from the manufacturers' standpoint to limit the ability of other states to adopt the new provisions, thus effectively negating the will of Congress in enacting section 177.

EPA believes that in general, provisions in voluntary agreements ordinarily should not be considered "standards" subject to section 209(a). The language of the statute appears to indicate that provisions in voluntary agreements

should not generally be considered standards under section 209. The legislative history of section 209 also appears to indicate that the prohibition in section 209 is meant to apply to state mandates (regulations and laws), not voluntary agreements. *See discussion, id.* at 23.

Moreover, if production requirements in voluntary agreements were generally preempted, then every such requirement in agreements in every state would be preempted. For example, any contractual agreement between a state and manufacturers to sell low emission vehicles in the state would be preempted. Since only California could overcome preemption through section 209(b), such agreements by all other states would violate the Clean Air Act, unless the relevant provisions were identical to those made by California. EPA believes it would be an inappropriate interpretation of section 209(a) to treat all such agreements as prohibited. Today's decision is limited to the unique circumstances of this case, and is not intended in any way to extend the scope of section 209 beyond regulatory requirements and the specific kind of circumstances considered here.

Massachusetts, however, does not assert that all types of agreements are *per se* preempted under section 209. Massachusetts instead argues that the California MOAs are really regulations in substance, and therefore are subject to section 209 and contain standards that can be copied by other states. California, on the other hand, emphasizes the "demonstration" aspects of the MOAs, and the fact that many provisions in the MOAs, like California's agreement to facilitate infrastructure, are not elements that would normally appear in state regulations.

EPA believes that the MOAs should be treated as standards adopted by California, based on the circumstances presented in this case. A binding regulatory requirement has in effect been replaced by a binding contractual arrangement. The contractual provisions address the same central issue of ZEV production requirements. In this case, the record indicates that the parties [15] intended these provisions to perform the function and take the place of

regulatory revisions, with the attendant benefits to the parties of such revisions. Absent the more stringent regulatory requirements they replaced, the agreements arguably would not have been entered into. Moreover, just as the mere fact that the Massachusetts program involves only a small number of vehicles is not relevant" to a determination whether that program is a "standard" under the Act, the fact that California asserts that it has created only a technology demonstration program is not relevant to a determination under section 209(a) regarding whether the program creates a standard.

The potentially severe liquidated damages resulting from a manufacturer's failure to comply with the MOAs, the manner in which such liquidated damages are decided (initial determination from the CARE Executive Officer, and *de novo* review by the Board, followed by *de novo* court review) and the lack of similar provisions in case of breach by California, perform the function of assessment of civil penalties for breach of a regulatory requirement. These contractual enforcement provisions provide an assurance to California comparable to the preexisting regulatory requirements. In addition, the MOAs were also entered into with an intention by the manufacturers to limit the ability of other states to adopt the new provisions under section 177. *AAMA II*, Brief for the Appellant, pp. 30-32; Letter from Kathleen Walsh, General Counsel, California Air Resources Board, to Jane Armstrong, Director, EPA Vehicle Programs and Compliance Division, dated May 16, 1997 (Docket No. A-99-08, Document No. II-D-04). These specific MOAs function as, and should be treated for the purposes of sections 209 and 177 as, standards in the nature of revisions to the preexisting regulatory ZEV mandate for the 1998-2002 time frame.

EPA is also concerned that not treating these MOAs as standards could encourage California and manufacturers to implement many regulatory measures using this approach, thereby both preventing other states from implementing such measures and escaping EPA review under section 209. EPA agrees with California that the latter concern is

tempered because California will ultimately need to show that its motor vehicle regulatory program (i.e., those measures that are in California's regulations) is in the aggregate as stringent as federal measures; however, even within that framework, California and manufacturers would have considerable ability to avoid the prescriptions of sections 209 and 177 through voluntary agreements.

Many of the arguments raised by California and the automobile manufacturers relate to the argument that voluntary arrangements are generally not covered by sections 209 and 177. As indicated above, EPA agrees with California and the manufacturers that generally such arrangements would not be covered by those sections. However, the unique circumstances of these MOAs clearly indicate that despite the "form" of the documents as contracts, the measures should be treated as standards adopted by California for the purposes of sections 177 and 209. Moreover, the argument that this result is contrary to the intent of Congress is not persuasive, given that Congress clearly intended that other states should have the right to copy California's motor vehicle standards, which is what Massachusetts intended.

[16] Thus, given the facts of this case, for purposes of CAA sections 209 and 177, the MOAs should be considered standards adopted by California. Thus, Massachusetts may use their existence to justify their ZEV standards under section 177.

(b) Are Massachusetts Standards Identical to California's

i. Comments

Manufacturers claim that California bound itself to infrastructure changes that are important for introduction of ZEVs. These obligations are not in Massachusetts's regulations. Thus, the manufacturers claim that Massachusetts's regulations are in any case not identical to the MOAs.

Massachusetts states in its brief that the obligations of

California are not "reciprocal" to manufacturers' requirements because the obligations are not dependent upon one another. Also, Massachusetts claims that CARB's obligations are not standards under sections 177 and 209.

ii. Analysis

EPA believes that Massachusetts's standards are identical to California's standards. California's commitments under the MOAs are clearly not "standards relating to the control of emissions from new motor vehicles" as that term is used under sections 177 and 209. Nor are they pre-conditions upon which the manufacturers' obligations are dependent. They are merely obligations regarding infrastructure that apply to California, not the manufacturers.

(c) Are the *ZEV*-Related Portions of California's MOAs Covered By a Waiver?

i. Comments

Manufacturers argued in their brief that Massachusetts' ZEV mandate is preempted because California has not received, or even requested, a waiver for the ZEV mandate in the MOAs. Manufacturers claim that Massachusetts may not rely on the waiver for California's pre-existing ZEV mandate because California's ZEV mandate for 1998-2002 has been repealed and because Massachusetts' ZEV mandate is "very different" from the original mandate.

Massachusetts argued in its brief that the ZEV mandate in the California MOAs is within the scope of the original waiver granted for California's ZEV mandate. Massachusetts notes that California need not seek a new waiver with respect to modification of standards for which EPA has already granted a waiver if the modifications do not undermine the initial decision of the Agency. Massachusetts claims that the relaxation of the ZEV mandate from the initial waiver to the MOAs does not undermine the finding from the initial waiver that California's programs is "in **[17]** the aggregate, at least as protective of public health and welfare as applicable Federal

standards' because the vast majority of the emissions reductions in the LEV program are accounted for by the NMOG fleet average standards and the bin structure of the regulations, not the ZEV mandate. Massachusetts also notes that the relaxation of the ZEV requirements make compliance easier, thus not implicating the requirement of section 209(b) that California standards be "consistent with section 202(a)." California states, without analysis, its belief that if the ZEV provisions of the MOAs were adopted as standards, they would be within the scope of the previous waiver.

ii. Analysis

EPA believes that the ZEV requirements in the MOAs are within the scope of the original waiver granted for California's LEV program in 1993. EPA has long recognized that once the Agency has granted a waiver of preemption for a California regulation, revisions to that regulation may be considered within-the-scope of the initial waiver, and thus not require a new waiver, if the revisions 1) do not undermine California's determination that its standards, in the aggregate, are as protective of human health and welfare as comparable Federal standards; 2) are not inconsistent with section 202(a) of the Act; and 3) raise no new issues affecting the initial waiver.

Massachusetts is correct that the reduction in size of the ZEV mandate from 1998-2002 does not undermine California's "in-the-aggregate" determination. The ZEV mandate was responsible for only a small portion of the emission reductions in the LEV program. The NMOG fleet average, which remains in place, is responsible for the vast majority of emission reductions from the LEV program. EPA has received no information to indicate that the MOA ZEV requirements would violate section 202(a) of the Act, which deal with technological feasibility and lead time. As Massachusetts notes, the fact that the MOA requirement actually reduce significantly the requirement to produce ZEVs in the 1998-2002 time frame, compared to the requirements for which EPA has granted a waiver, indicates

that the requirements of section 202(a) have been met. Nor does the new ZEV requirement raise any new issues affecting the initial waiver, beyond the issues discussed above. EPA will be providing a more detailed discussion of these issues shortly in the context of its response to California's request for a within-the-scope determination of its revisions to its LEV regulations. **[18]**

III. Conclusion

For the reasons provided above, EPA believes that under these unique circumstances, "Massachusetts's ZEV mandate is identical to a standard that California has adopted for model years 1998-2000. It is therefore permitted under CAA sections 209 and 177.[16]

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[16] On August 4, 1999, President Clinton signed Executive Order 13132 on federalism ("EO 13132"). 64 Fed. Reg. 43255 (Aug. 10, 1999). EO 13132 is not effective until November 2, 1999; however, the previous Executive Order on federalism, EO 12612, which is revoked by EO 13132, remains in effect until that date. It is unclear whether this document would be subject to EO 13132 or EO 12612 as a "policy that has federal implications" or an "action limiting the policy discretion of the States." See sections 1(a) and 3(b) of both orders. In any case, EPA has, consistent with section 3(a) of both orders, closely examined the basis for the opinions contained in this document, as provided above. The problems that led Congress to enact sections 209 and 177, in particular, the need to protect interstate commerce by preventing a patchwork of differing state standards while ensuring the ability of states to enact motor vehicle standards more stringent than federal standards, are clearly problems of national significance, appropriate for national activity under section 3(b) of both orders. EPA has also consulted with states, and received comments from several states in the process of issuing this document Section 4(c) of the orders indicates that executive departments and agencies should restrict regulatory preemption of state law to the minimum level necessary to achieve the objectives of the statute. Consistent with section 4(c), the interpretations provided in this document were developed with particular concern for ensuring that preemption of state actions are minimized to the extent possible to achieve the goals of the Clean Air Act.